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No. 15-___

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

2. Whether execution of a condemned individual more than three-and-one-half decades after the imposition of a death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bobby James Moore respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals under review (App. 1a-126a) is reported at 470 S.W.3d 481 (Tex. Crim. App. 2015). The findings of fact and conclusions of law of the state habeas trial court (App. 127a-203a (regarding claims one through three); App. 204a-287a (regarding claims four through forty-eight, *see* App. 287a)) are unreported.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals issued its judgment on September 16, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. On April 25, 1980, Bobby James Moore and two other individuals set out to rob a grocery store in Houston, Texas. During the course of the bungled robbery, one of the store's employees was shot and killed. The State charged Moore with capital murder as the shooter. The jury returned a guilty verdict on July 15, 1980, and, in the punishment phase, returned affirmative answers to the two special issues required under Texas law for imposition of the death penalty. R02621.[1] Moore was sentenced to death. R02622. The Texas Court of Criminal Appeals ("CCA") affirmed Moore's murder conviction and death sentence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113 (1986).

2. Following habeas proceedings in state and federal courts, a federal district court found that Moore was deprived of his right to the effective assistance of counsel during his trial and punishment phase, with prejudice in the punishment phase, and granted his habeas petition regarding his death sentence. The Fifth Circuit affirmed. It held that the failure of Moore's counsel to "investigate, develop or present mitigating evidence, including exculpatory evidence that the offense was accidental, during either phase of Moore's capital trial, constituted constitutionally deficient performance that prejudiced the outcome of the punishment phase of Moore's trial." *Moore v. Johnson*, 194 F.3d 586, 593 (5th Cir. 1999).[2] The court

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[1] All record citations ("R") are to the Clerk's Record for the state habeas proceedings.

[2] The Fifth Circuit's decision was issued after this Court granted Moore's certiorari petition, vacated a previous decision,

ordered that Moore be given a new punishment proceeding or a sentence less than death.

The state court conducted a new sentencing hearing. On February 14, 2001, Moore again was sentenced to death. R02624-02625. He filed a motion to set aside the new sentence, which was denied. The State returned Moore to death row, where he was placed in highly isolated confinement—what the State calls "administrative segregation"—in Texas's Polunsky Unit on April 11, 2001. *See, e.g.*, R01825; R01827; *see infra*, 8-9 & n.4 (discussing administrative segregation).

Moore appealed. He also filed a motion to stay his appeal until the Texas legislature enacted legislation pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), on the ground that the Eighth Amendment barred the imposition of a death sentence against him in light of his intellectual disability. The CCA denied Moore's motion, and later affirmed his death sentence. It concluded, among other things, that it would not be cruel and unusual to execute him after decades on death row. *Moore v. State*, No. 74,059, 2004 Tex. Crim. App. Unpub. LEXIS 11, at *28 (Tex. Crim. App. Jan. 14, 2004), *cert. denied*, 543 U.S. 931 (2004).

3. On June 17, 2003, Moore filed a state court writ challenging his 2001 punishment retrial and death sentence. Moore raised forty-eight claims, including that the Eighth Amendment barred his execution because he was intellectually disabled, R00048-00061, and that execution after his prolonged

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and remanded in light of *Lindh v. Murphy*, 521 U.S. 320 (1997). *See Moore v. Johnson*, 521 U.S. 1115 (1997).

confinement on death row would constitute cruel and unusual punishment. R00202-00215. Regarding the latter claim, Moore emphasized the psychologically traumatic conditions that he experienced in administrative segregation in Polunsky. R00209-R00210.

Following a January 2014 evidentiary hearing on Moore's *Atkins* claim, the state habeas court determined on February 6, 2014 that Moore's petition should be granted in part and denied in part. Regarding Moore's *Atkins* claim, the court concluded that Moore had established "that he meets the definition of mental retardation under the current guidelines of the [American Association on Intellectual and Developmental Disabilities ("AAIDD")], under both the [American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV ("DSM-IV") and V ("DSM-V")], and under the prevailing legal standards per [*Atkins*]." App. 202a ¶183; App. 203a ¶186.

The court determined that (i) Moore's "mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the [American Association on Mental Retardation ("AAMR")]," App. 201a ¶180; (ii) Moore's intellectual disability was supported by "the determination[s] of three highly qualified expert witnesses . . . that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning," App. 201a ¶181; and (iii) "[t]here is ample evidence that Mr. Moore suffered from significant deficits in adaptive functioning . . . before the age of 18," App. 201a ¶178. *See also* App. 202a ¶183 ("The record is replete with clear indications from his early childhood risk factors,

sub-normal intellectual functioning, and adaptive deficits that would qualify Mr. Moore as mentally retarded."). The court observed that Moore failed first grade twice (and was held back) and failed every grade thereafter (but was "socially promoted" each year) until he dropped out of school in ninth grade. App. 183a-190a. At the age of 13, Moore required "daily drills" from his teacher on topics such as the days of the week, the months of the year, and the ability to tell time. App. 187a ¶153.

The state habeas court denied Moore's requests for relief on non-*Atkins* grounds, including his claim that executing him decades after imposition of his initial death sentence would constitute cruel and unusual punishment. App. 279a-281a. The court stated that Moore could not "complain or show prejudice based on any alleged inordinate delay from the time of his conviction to his . . . [forthcoming] execution due to his multiple and continued efforts to attain appellate review and/or post-conviction relief in state and federal courts." App. 279a ¶149. The court did not mention that the appellate and post-conviction litigation had been necessary to remedy one constitutional violation (ineffective assistance, which rendered the first death sentence unconstitutional) and attempting to remedy another constitutional violation (the *Atkins* claim, which the habeas court found meritorious).

4. The CCA held that the state habeas court erred by relying on current medical standards governing intellectual disability rather than a superseded twenty-three-year-old standard, and accordingly refused to grant Moore habeas relief on his *Atkins* claim. App. 5a-6a. The CCA explained that it "continue[s] to follow the . . . 1992 definition of intel-

lectual disability that [it] adopted in [*Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)] for *Atkins* claims presented in Texas death-penalty cases." App. 5a. Despite its recognition that the medical community's "conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided," the CCA determined that the habeas court erred in "us[ing] the most current position, as espoused by the AAIDD, regarding the diagnosis of intellectual disability rather than the test that [the CCA] established in *Briseno*." App. 6a. The CCA asserted that the obligation to "implement *Atkins*'s mandate" rests with the State's legislature, not the judiciary. App. 5a. With this threshold issue resolved, the court proceeded to consider Moore's claim.

First, the court determined that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning," based solely on its consideration of two of the seven IQ scores in the record: Moore's "78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989." App. 63a, 73a. The CCA determined that these two scores placed him "above the intellectually disabled range," and that, for that reason alone, he was not intellectually disabled. App. 75a. Although the CCA stated that it would apply a "standard error of measurement" of five points, App. 74a, it decided not to credit the below-70 low end of the range for the 74 IQ score, App. 74a-75a. The CCA also chose to disregard several other IQ scores in the record, including Moore's 57 IQ score at age 13 and his 59 IQ score at age 54. *See* App. 63a-74a. And, although the CCA acknowledged *Hall v. Florida*, 134 S. Ct. 1986 (2014) at the

outset of its opinion, App. 7a, it did not comply with *Hall*'s holding that IQ results are not mechanically determinative, or considered in isolation. App. 63a-75a. Nor did the CCA consider that *Hall* applied current medical standards, rather than the abandoned medical standards invoked by the CCA.

Second, the CCA held that "[e]ven if [Moore] had proven that he suffers from significantly sub-average general intellectual functioning, his *Atkins* claim fails because he has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning." App. 75a. The court explained that its *Briseno* evidentiary factors "weigh[ed] heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning." App. 89a.

The CCA affirmed the trial court's denial of relief on the remaining grounds—including Moore's claim that executing him after prolonged confinement under sentence of death would violate the Eighth Amendment—without explanation. *See* App. 92a-93a.

One CCA judge dissented from the *Atkins* holding. Judge Alcala disagreed that the CCA "properly 'continue[s] to follow the AAMR's 1992 definition of intellectual disability.'" App. 99a-100a (quoting App. 5a). She explained that, under *Atkins* and *Hall*, the CCA "must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and . . . [the CCA's] reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable." App. 104a. The dissent emphasized that "the continued application of the *Briseno* standard . . .

does not conform to the requirements of the federal Constitution," App. 125a, and explained, among other things, that the CCA "improperly applies a strict cut-off based on IQ scores" and "erroneously applies unscientific criteria to assess whether a defendant has adaptive deficits," App. 100a-101a. The dissent also criticized the majority for "[m]erely lamenting the Texas Legislature's failure to act in the decade since *Atkins* was decided," which "abdicates this Court's responsibility to ensure that federal constitutional rights are fully protected in Texas." App. 95a n.2.

5. Moore, now 56 years old, first was sentenced to death over 35 years ago, at the age of 20. Twice in the three-and-one-half decades since that imposition of the death sentence, the State signed death warrants and set his execution date: one death warrant was stayed less than 24 hours before he was to be executed, and the other only five days before the scheduled execution date. *Moore v. McCotter*, No. H-86-835, Order Granting Stay of Execution (S.D. Tex. Feb. 25, 1986); *Moore v. Collins*, No. H-93-3217, Order Granting Stay of Execution (S.D. Tex. Oct. 21, 1993).

For nearly fifteen years (since April 2001), Moore has been held almost continuously in "administrative segregation" in Texas's Polunsky Unit. *See, e.g.*, R01825; R01827; R02582-R02597.[3] As one element of his state habeas claim that it would be cruel and un-

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[3] During sixty-nine days of this period, at the direction of the state habeas judge, Moore was in a county jail, not death row, for a court-ordered psychological exam. App. 46a. He also was held in a county jail for several weeks in the run-up to his January 2014 evidentiary hearing.

usual to execute him after his prolonged period on death row, Moore emphasized the isolated conditions he had experienced in administrative segregation on death row in the Polunsky unit: "inmates held in administrative segregation by the Texas Department of Criminal Justice [("TDCJ")] are deprived of even the most basic psychological needs and suffer 'actual psychological harm from their almost total deprivation of human contact, mental stimulus, personal property and human dignity.'" R03537-R03538 (citation omitted); *accord* R00209-00210. Pursuant to the Death Row Plan of the TDCJ, a death row segregation inmate spends approximately 22.5 hours per day alone in his cell and is ineligible for contact visits.[4]

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[4] The TDCJ's plan is available online (http://tifa.org/wp-content/uploads/2014/02/Administrative-Segregation-Death-Row-Plan-1.pdf). *See also Scheanette v. Riggins*, No. 05-cv-00034, Docket No. 20-2, Aff. of Billy Hirsch, Assistant Warden for Death Row at the Polunsky Unit, ¶¶ 6, 9, 13 (Sept. 7, 2005) (death row inmates at Polunsky "are kept in their cells for 22½ hours per day"; "[c]ontact between inmates is not allowed as all death row assigned inmates are assigned to death row segregation"; "out of cell time is limited to recreation time and showers"; "televisions are not made available to offenders on death row"; and "death row inmates are not allowed physical access to the law library").

REASONS FOR GRANTING THE WRIT

This case presents two important questions, both of which raise fundamental Eighth Amendment issues: (1) the permissibility of prohibiting the use of current medical standards in assessing intellectual disability under *Hall* and *Atkins*, and (2) the permissibility of executing an individual after decades of confinement under a death sentence.

1. In *Hall* and *Atkins*, this Court established a fundamental constitutional principle: the Eighth Amendment bars the execution of persons who are intellectually disabled according to current medical standards. Faithfully applying the current medical definition of intellectual disability, the state habeas trial court determined that Moore is intellectually disabled and constitutionally ineligible for the death penalty.

In a startling decision, the CCA rejected the habeas court's determination, concluding that the court "erred by . . . employing the definition of intellectual disability presently used." App. 6a. It held instead that an outdated, superseded twenty-three-year-old definition of intellectual disability governed the constitutional inquiry and that Moore was not intellectually disabled under that standard.

The CCA's ruling sharply conflicts with this Court's decisions in *Atkins* and *Hall*, which emphasize that it is the duty of the judiciary to enforce the Eighth Amendment by relying on current medical standards when conducting the intellectual-disability inquiry. It also augurs the all-too-real possibility that intellectually disabled prisoners across the State of Texas will be condemned to their death—in violation of the Constitution—simply because they might

not have been considered intellectually disabled a quarter-century ago. And it conflicts with decisions of other state and federal courts, which apply current medical standards to *Atkins* claims. Review is needed to vindicate the constitutional prohibition against executing intellectually disabled persons and to ensure that *Atkins* and *Hall* do not become dead letters in the State that carries out far more executions than any other State. *See* Death Penalty Information Center, Executions by State and Year, http://www.deathpenaltyinfo.org/node/5741.

2. The Court also should now resolve the important issue whether execution after an excessively long period of confinement under a death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. Forcing a prisoner to endure decades on death row raises profound constitutional concerns. These concerns are even more pronounced when, as here, the condemned individual is forced to spend many years on death row largely confined alone in his cell. And because such prolonged death-penalty confinement thwarts the purposes that the death penalty is designed to serve, executing a prisoner initially sentenced to death decades ago would represent needless pain and suffering in violation of the Eighth Amendment.

These grave constitutional problems have particular force here because Moore originally was sentenced to death more than thirty-five years ago—giving rise to an exceptionally long period on death row. The ever-increasing frequency of extraordinarily long periods of confinement under a sentence of death underscores the need for this Court to address an issue it has not resolved: whether the Constitu-

tion permits executing prisoners after decades of sentenced-to-death confinement.

I. This Court Should Hold That A Prohibition On The Use Of Current Medical Standards In Determining Whether A Capital Defendant Is Intellectually Disabled Violates The Eighth Amendment.

Applying current medical standards, the state habeas trial court held that Moore is intellectually disabled and ineligible for the death penalty under *Atkins*. But the CCA reversed on the ground that Texas courts are *required* to apply a decades-old definition of intellectual disability to an *Atkins* challenge and that, under that standard, Moore is eligible for the death penalty.

This Court's review is necessary to ensure the continued vitality of a bedrock constitutional requirement first announced in *Atkins* and expounded two Terms ago in *Hall*: the Eighth Amendment bars the execution of a prisoner who is intellectually disabled under current medical standards. The CCA eschewed this core principle in favor of applying an outdated definition of intellectual disability that conflicts with the prevailing medical consensus. Abdicating its obligation to enforce the Eighth Amendment to bar the execution of intellectually disabled prisoners, Texas's highest criminal court has decided that Texas courts must continue to apply a 1992 standard of intellectual disability unless and until the State's legislature sees fit to enact a statute, even though the applicable medical standards for diagnosing intellectual disability have changed since that time. The State's approach defies both the Con-

stitution and common sense, conflicts with the approach taken by other state and federal courts, and warrants review by this Court.

1. In *Atkins*, this Court held that the Eighth Amendment prohibits the execution of persons with intellectual disability. Citing the impairments described in clinical definitions, *Atkins* concluded that defendants with intellectual disability bear diminished personal culpability "by definition." 536 U.S. at 318. The Court cited two clinical definitions with which those states already barring the execution of persons with intellectual disability "generally conform[ed]": the definitions adopted by the AAMR – since renamed the AAIDD – and the APA. *Id.* at 309 n.3, 317 n.22.

This Court subsequently reiterated that "clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. Because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose" intellectual disability, *id.* at 1993, a state's legal determination must be "informed by the medical community's diagnostic framework," *id.* at 2000. States may not "go[] against the unanimous professional consensus," *id.*, nor "disregard[] established medical practice," *id.* at 1995.

Both *Atkins* and *Hall* thus require courts to consult current medical standards. In each case, this Court defined the relevant medical standards by consulting the then-current views of the AAIDD/AAMR and the APA. Thus, whereas *Atkins* had looked to the AAMR's 1992 definition of intellectual disability, *Hall* was guided by the AAIDD's 2010 definition. *See Hall*, 134 S. Ct. at 2000; *Atkins*, 536 U.S. at 309 n.3.

And whereas *Atkins* had looked to the most recent text revision to the fourth edition of the APA's DSM (DSM-IV), published in 2000, *Hall* was guided by the fifth edition (DSM-5), published in 2013. *See Hall*, 134 S. Ct. at 1990, 1994-95, 2000-01; *Atkins*, 536 U.S. at 309 n.3. Indeed, *Hall* not only adopted the new standards' revised terminology but also relied on their shift of focus away from rigid reliance on IQ scores alone and toward a conjunctive and interrelated assessment of intellectual disability, with a greater emphasis on adaptive functioning. *See* 134 S. Ct. at 2000-01.[5]

The CCA reversed the state habeas court for complying with this Court's mandate in *Atkins* and *Hall* that courts must apply currently accepted medical standards in assessing a capital defendant's intellectual disability claim. *See* App. 6a-7a (while "[i]t may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability" have changed, any relevant scientific and medical developments "do not determine whether an individual is exempt from execution under *Atkins*"). Accordingly, Texas courts are now required to apply abandoned medical standards in assessing intellectual disability claims in capital cases. Such an outcome cannot be reconciled with *Atkins* and *Hall*, which make clear

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[5] Although the basic diagnostic framework for intellectual disability has consistently looked to intellectual functioning, adaptive functioning, and age of onset, there have been major changes over time in the relationship between these factors and how they are evaluated. *See generally* Nancy Haydt et al., *Advantages of DSM–5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. Rev. 359, 362-67 (2014).

that the legal standard *must* be informed by current medical criteria.

Notably, the CCA did not even seriously consider the substance of the clinical changes acknowledged in *Hall*—much less apply them to Moore's claim. Instead, the court merely asserted mechanically that the legal standard it established in *Briseno* remains "adequately 'informed'" by medical standards and is "generally consistent with the AAIDD's current definition of intellectual disability," and that the state habeas court "erred by . . employing the definition of intellectual disability presently used by the AAIDD." App. 6a, 7a n.5. The court cited no authority for its "cling-to-an-abandoned-medical-standard" approach to protecting Eighth Amendment rights, and elided entirely the significant changes to prevailing medical standards since *Briseno*.[6]

Moreover, it is clear that, under the CCA's decision, outdated medical standards will be the basis of Texas's evaluation of intellectual disability indefinitely. The CCA emphasized that it will maintain its previous standard for intellectual disability irrespec-

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[6] The one aspect of the updated medical standards that the court briefly mentioned—the DSM-5's statement that an individual's "deficits in adaptive functioning must be directly related to [his] intellectual impairments," App. 7a n.5—ignores not only the marked shift of the DSM-5 toward greater emphasis on adaptive functioning, but also that the DSM-5 defines intellectual impairments in terms of particular deficits, and deemphasizes IQ-score test results that *Briseno* requires be "related" to deficits in adaptive functioning. *Compare Briseno*, 135 S.W.3d at 7, *with* DSM-5 at 37-38; *see also* Haydt, *supra*, 82 UMKC L. Rev. at 379 ("The DSM-5 links deficits in adaptive functioning with co-occurring deficits in intellectual functioning and requires a careful examination of adaptive behavior for reliable interpretation of IQ scores.").

tive of any changes in medical standards "unless and until the Legislature acts, which [the CCA] ha[s] repeatedly asked it to do," App. at 7a, and which the Legislature has declined to do for more than a decade. Thus, intellectually disabled persons convicted of capital offenses under Texas law will have to seek relief under anachronistic medical standards that will only become even more outdated over time. It is clear, of course, that whether the Texas legislature acts or does not act has nothing to do with the state judiciary's Eighth Amendment obligation under *Atkins* and *Hall*.[7]

Compounding this problem and further stacking the deck against intellectually disabled prisoners is the fact that outdated medical standards are "very difficult (if not impossible) to apply in practice" with reliability, since clinicians testifying as expert witnesses are obligated to "set aside much of their training in psychological standards and to train themselves (for *Atkins* purposes alone) in the outdated standards existing" at some past date. *United States v. Wilson*, 922 F. Supp. 2d 334, 340 (E.D.N.Y. 2013) (rejecting argument that court should apply outdated standard). This problem is especially alarming because factfinders in the judicial process rely heavily on the expert testimony of clinical professionals to explain the nature of intellectual disability and to help them assess whether a particu-

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[7] In *Briseno*, the CCA stated that it was providing "temporary judicial guidelines" pending legislative action. 135 S.W.3d at 5. As the dissent here explained, judicial calls for legislative action do not satisfy the court's "responsibility to ensure that federal constitutional rights are fully protected in Texas" by "uphold[ing] the federal Constitution as it has been interpreted by the Supreme Court." App. 95a n.2.

lar individual meets diagnostic criteria. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) (emphasizing professionals' role in advising factfinders regarding insanity).

The CCA's decision also creates a conflict and disagreement among state courts. If allowed to stand, it could persuade other states similarly to maintain standards for assessing intellectual disability that are not medically informed. Prior to *Hall*, some state courts diminished the significance of medical standards and rejected reliance on them. *See Williams v. Cahill ex rel. Cty. of Pima*, 303 P.3d 532, 543–44 (Ariz. Ct. App. 2013), *review denied* (Nov. 26, 2013). Since *Hall*, however, state courts addressing the issue consistently have held that current medical standards should be considered. *See, e.g., State v. Agee*, ---P.3d---, 358 Or. 325, 353-54 (2015) (remanding for a new *Atkins* hearing where "the trial court did not apply now-current medical standards in determining that [the] defendant had not met his burden of proof to show that he has an intellectual disability"); *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015) (acknowledging "new definitions of intellectual disability" that have been promulgated "[a]s part of the medical community's evolving understanding of intellectual disability and its diagnosis"; "adopt[ing] the 2010 AAIDD and 2013 APA definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of [Mississippi] in addition to the definitions promulgated in *Atkins* . . .").

In the most recent state case to address the issue, the Oregon Supreme Court reversed a trial court's determination that a defendant had not proven that he was intellectually disabled under *Atkins* because

the trial court "did not apply now-current medical standards." *Agee*, 358 Or. at 353-54. The court carefully considered the "significant change in the way that intellectual disability is diagnosed" under current medical standards, whereby "proof of 'significantly subaverage intellectual functioning'" is "no longer require[d]" and "intellectual functioning [is] interpreted in conjunction with adaptive functioning in diagnosing intellectual disability." *Id.* at 350, 353. Recognizing the "high level of scrutiny [] required in death penalty cases," the court determined that a ruling based on outdated medical standards "would 'create[] an unacceptable risk that [a] person[] with intellectual disability will be executed.'" *Id.* at 354 (quoting *Hall*, 134 S. Ct. at 1990)). Accordingly, it reversed and remanded for a new *Atkins* hearing, and directed the trial court to consider "the evidence presented in light of the standards set out in the DSM-5 and discussed in *Hall*." *Id.* The Oregon Supreme Court's decision, which requires its courts to consider current medical standards in assessing an *Atkins* claim, stands in direct conflict with the CCA's decision here, which prohibits courts from applying those same standards.

The CCA's decision also conflicts with the decisions of numerous federal courts, which, like their post-*Hall* state-court counterparts, routinely rely upon current medical standards to assess intellectual disability in capital cases. *See, e.g.*, *Sasser v. Hobbs*, 735 F.3d 833, 843-45 (8th Cir. 2013) (finding Arkansas's revised statute consistent with DSM–5); *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 WL 1516147, at *3-4 (W.D. Tenn. Jan. 28, 2014) ("federal courts have routinely and sensibly made reference to the most updated literature in the field"

when evaluating *Atkins* claims; "[t]he [c]ourt will rely on the two clinical definitions of [intellectual disability] promulgated by the AAIDD and the APA—the eleventh edition of AAIDD Manual, and the DSM-V—as they are the most current iterations of the authoritative resources on the field"); *Wilson*, 922 F. Supp. 2d at 341 & n.5 (relying on 2010 edition of the AAIDD Manual, which "reflects the AAIDD's view of the current best practices in the field"; "[t]he court is aware of no case in which a court has considered itself bound to apply outdated clinical standards in making an *Atkins* determination.").

2. The CCA's decision to prohibit consideration of current medical standards in assessing intellectual disability has life-and-death significance in this case. As reflected in the state habeas court's determination, application of the current (and constitutionally proper) standard for assessing intellectual disability compels the conclusion that Moore is intellectually disabled and exempt from the death penalty. It was only by applying outdated and non-clinical standards in its assessment of Moore's (i) intellectual functioning and (ii) adaptive deficits that the CCA was able to reach the opposite result. Review is required to ensure that Moore's life is not taken by the State in violation of the Constitution.

Intellectual Functioning. Under the first prong of its *Atkins* assessment, the CCA required Moore to prove that "he suffers from significantly sub-average general intellectual functioning, generally shown by an IQ of 70 or less." App. 63a. In conducting this inquiry, the CCA violated current medical standards by treating Moore's two above-70 IQ scores (a 74 and 78, with, according to the CCA, a standard error of measurement of five points) as dispositive of his *At-*

kins claim. *See* App. 63a, 75a (concluding that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning" based solely upon consideration of his IQ scores). This determination conflicts with the "holding in *Hall* . . . that it is unconstitutional to foreclose all further exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70." *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (internal quotation marks and citation omitted). Furthermore, current medical standards recognize that "'[a] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score.'" *Hall*, 134 S. Ct. at 2000-01 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("DSM-5")). As a result, "[i]t is not sound to view a single factor as dispositive" of "the conjunctive assessment necessary to assess an individual's intellectual ability" under those standards. *Hall*, 134 S. Ct. at 2000-01; *Agee*, 358 Or. at 350 (recognizing this "significant change in the way that intellectual disability is diagnosed"). The CCA erred, therefore, by "disregard[ing] established medical practice," *Hall*, 134 S. Ct. at 1995, in concluding that Moore failed to prove that he had significantly subaverage general intellectual functioning based on an assessment of his IQ scores of 74 and 78 alone.

Moreover, even if a strict numerical approach were acceptable under current medical standards, the CCA's analysis still would not comport with those standards because Moore's cherry-picked score of 74 falls "squarely in the range of potential intellectual

disability," and, in any event, the low-end of that score (as well as three others excluded by the CCA) falls below 70. *See Brumfield*, 135 S. Ct. at 2278 (state court's conclusion that petitioner could not possess significantly subaverage intelligence with IQ test result of 75 was "an unreasonable determination of the facts"); *Hall*, 134 S. Ct. at 2001 (rejecting Florida's "rigid rule" treating IQ score in the marginal range as dispositive). The CCA erroneously disregarded the low end of the IQ-score range produced by this test in part because of Moore's "history of academic failure," App. 75a, even though under current medical standards a finding of poor performance in school *supports* a diagnosis of intellectual disability, *see* DSM-5 at 38. The court also found that his IQ score might be in the high end of the range because he took the test while on death row, App. 75a, setting up a Catch-22 that *Hall* conspicuously avoided, *see Hall*, 134 S. Ct. at 1995 ("a score of 71 . . . is generally considered to reflect a range between 66 and 76"); Br. for Resp't at 3, 7, *Hall*, 134 S. Ct. 1986 (No. 12-10882) (test on which petitioner scored 71 was administered in 2002, long after death sentence had been imposed, with no suggestion that low end of range should be disregarded because he was on death row).

Adaptive Deficits. The CCA, while concluding that Moore "failed to prove . . . that he has significantly sub-average general intellectual functioning," App. 63a, nevertheless proceeded to analyze whether Moore suffered "significant and related limitations in adaptive deficits." App. 75a. In its analysis of this issue, the CCA likewise failed to comport with established medical practice in at least two significant ways.

First, the CCA departed from prevailing medical standards by using Moore's perceived adaptive strengths as a means by which to negate a diagnosis of intellectual disability. This is inconsistent with current medical standards, which place significant emphasis on adaptive *deficits*. *See Hall*, 134 S. Ct. at 2000–01; *Agee*, 358 Or. at 343–44, 353; DSM-5 at 37; Haydt, *supra*, 82 UMKC L. Rev. at 367. Indeed, under current standards, an individual's significant limitations in conceptual, social, or practical adaptive skills are not outweighed by his potential strengths in some adaptive skills. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 47 (11th ed. 2010) ("AAIDD Manual"); *see also Brumfield*, 135 S. Ct. at 2281 ("intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation'") (citation omitted). The CCA, however, has chosen to disregard this prevailing approach, and instead "consider[s] all of the person's functional abilities, including those that show strength as well as those that show weakness." App. 11a; *see also* App. 12a (finding that the state habeas court "erred" in following current medical standards by "consider[ing] only weaknesses in [Moore]'s functional abilities").

Thus, notwithstanding the DSM-5's "more read[y] acknowledge[ment] that people with intellectual disabilities are often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families," App. 112a-113a (dissenting opinion), and despite present AAIDD guidance that "[t]he diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail

or prison, or 'criminal adaptive functioning,'" AAIDD, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Support* 20 (2012), the CCA found that evidence of just such "adaptive skills" negated Moore's significant adaptive deficits in academic skills and social interaction. *See, e.g.*, App. 87a (criticizing defense expert's "minimization of the evidence that [Moore] had learned to survive on the street and in prison," and crediting state's expert who "saw evidence that [Moore] had developed adaptive skills in prison"); App. 80a-83a (finding the fact that Moore lived in the back of a pool hall, played pool there, and later played dominoes with another inmate while in prison to be substantial proof that he lacked adaptive deficits). By using "evidence of adaptive skills"—and especially by using evidence of such "skills" as surviving on the streets and in prison—to offset Moore's significant adaptive limitations, *see* App. 80a, 81a, 82a, 83a, 84a, the CCA broke with current medical standards. *See, e.g.*, *Sasser*, 735 F.3d at 848 (adaptive skills prong of clinical intellectual disability definition "does not involve balancing strengths against limitations. It simply requires deciding whether the evidence establishes significant limitations in two of the listed skill areas.").

Second, the CCA departed from current medical standards by completely discounting Moore's significant adaptive deficits based on an overly broad notion of "relatedness" that effectively imposes a causation inquiry not recognized by medical standards. As noted above, the CCA requires an *Atkins* applicant to prove that "his significantly sub-average general intellectual functioning is accompanied by *related* and significant limitations in adaptive functioning." App. 6a (emphasis added). The CCA

previously had explained that this requirement meant that "adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder.'" *Ex parte Hearn*, 310 S.W.3d 424, 428-29 (Tex. Crim. App. 2010). Here, in stark conflict with current medical standards, the CCA seized upon the word "related" and summarily determined that Moore's significant academic and social deficits "were caused by a variety of [other] factors" including "trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, . . . racially motivated harassment and violence at school, [and] a history of academic failure. . . ." App. 88a-89a. In so holding, the CCA completely disregarded current clinical guidance that other disorders and environmental challenges can, and frequently do, coexist with intellectual disability. *See* DSM-5 at 40 (observing that "rates of some conditions" are "three to four times higher" in individuals with intellectual disability "than in the general population"); AAIDD Manual at 46; John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 725–29 (2009).[8]

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[8] Although the CCA declared that the state habeas court erred in relying upon a definition of intellectual disability that "omits the requirement that an individual's adaptive behavior deficits, if any, must be 'related to' significantly sub-average general intellectual functioning,'" App. 6a, this statement is without merit. In its findings, the state habeas court expressly acknowledged the CCA's holding in *Hearn*, 310 S.W.3d at 428-29, that adaptive deficits must be related to subaverage intellectual functioning instead of a personality disorder, App.161a ¶92, but, noting that no party had alleged that Moore suffered from a personality disorder, App. 161a-162a ¶94, found no reason to

On these outdated and unscientific bases, the CCA rejected the habeas trial court's finding—which was made based on current medical standards—that Moore had met his burden of showing the adaptive deficits given central importance under those standards.[9] Notably, Moore scored 2.5 standard deviations below the mean on a generally accepted standardized test of adaptive behavior, *see* App. 77a; and, according to the AAIDD, for clinical diagnostic purposes a score of approximately two standard deviations below the mean indicates "significant limitations," AAIDD Manual at 43. Even the State's expert witness acknowledged "limitations in [Moore]'s academic skills and some adaptive deficits in social interaction during the developmental period." App. 80a. Under current medical standards, a significant limitation in just one area of functioning is sufficient to establish intellectual disability when coupled with concurrent

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question that Moore's adaptive deficits were related to his subaverage intellectual functioning, *see* App. 161a-162a ¶¶94-95. In any event, the state habeas court also expressly found that Moore was intellectually disabled under the DSM-5, App. 202a, which the CCA itself acknowledges, requires a determination that an individual's "'deficits in adaptive functioning must be directly related to [his] intellectual impairments' to meet the diagnostic criteria of intellectual disability.'" App. 7a n.5.

[9] As the dissent explained, the CCA also departed from established medical practice through its reliance on its "*Briseno* evidentiary factors," App. 90a-92a, which have been criticized for being based on non-medical criteria and stereotypes, such as the CCA's invocation of the fictional character Lennie from John Steinbeck's *Of Mice and Men* as the exemplar of the individual who might not be executed under *Atkins*. *See, e.g.*, App. 116a-118a; *see also* App. 97a and n.5 (citing numerous journal articles "criticiz[ing]" the *Briseno* Court for "applying an unscientific standard" to assess intellectual disability).

significant limitations in intellectual functioning, *see* DSM-5 at 33; AAIDD Manual at 46—as established by the record here.

Because there is no way to reconcile the CCA's determination that Moore is not intellectually disabled with current medical standards governing the assessment of intellectual disability, review is necessary to ensure that Moore—and many others like him—are not unlawfully executed.

II. This Court Should Consider Whether An Excessive Period of Confinement Under A Death Sentence Violates The Eighth Amendment.

"By protecting even those convicted of heinous crimes," the Eighth Amendment's prohibition on excessive punishment "reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man," and the Amendment thus "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311–12; *see also Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."). Applying these fundamental principles to prisoners languishing on death row, individual Justices have emphasized that execution after an excesexcessively long period of confinement under a death sentence presents a substantial and troubling ques-

tion regarding cruel and unusual punishment under the Eighth Amendment.[10]

The need for this Court's consideration is clear. In just the last decade, the average time between sentencing and execution has skyrocketed from eleven years to nearly eighteen years. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., joined by Ginsburg, J., dissenting). Prolonged confinement for many decades under sentence of death represents a sword of Damocles perpetually hanging just above the condemned individual's head. An excessive period of confinement under a death sentence is repugnant to the Founders' intent, and plainly contrary to the "dignity of all persons." It violates the Eighth Amendment.

The issue now is both ripe for this Court's review and urgent in light of the possibility that cruel and unusual punishment is being inflicted on condemned individuals. The Court should decide, once and for all, whether the Eighth Amendment places constraints on the amount of time that a prisoner is forced to live under the constant specter of a looming execution at the hands of the State.

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[10] *See Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting); *Correll v. Florida*, Nos. 15-6551, 15A424, 2015 WL 6111441 (U.S. Oct. 29, 2015) (Breyer, J., dissenting); *Valle v. Florida*, 132 S. Ct. 1 (2011) (Breyer, J., dissenting); *Johnson v. Bredeson*, 558 U.S. 1067 (2009) (Stevens, J., statement); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (Stevens, J., statement); *id.* (Breyer, J., dissenting); *Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J., dissenting); *Allen v. Ornoski*, 546 U.S. 1136 (2006) (Breyer, J., dissenting); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting); *Gomez v. Fierro*, 519 U.S. 918 (1996) (Stevens, J., dissenting); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., statement.).

1. The Court's review is particularly warranted in this case. Moore initially was sentenced to death in 1980. The more-than-three-and-one-half decades that Moore has endured since imposition of his death sentence is an exceptionally long time. It outstrips the "astonishingly long" twenty-year period, *Knight*, 528 U.S. at 993 (Breyer, J., dissenting), and the "extraordinary" thirty-two-year period, *Thompson*, 129 S. Ct. at 1300 (Stevens, J., statement), in past petitions. If Moore ultimately is executed, he "will have been punished both by death and also by more than a generation spent in death row's twilight." *See Foster*, 537 U.S. at 993 (Breyer, J., dissenting).

More than a century ago, this Court highlighted the profound problems of a prolonged period of confinement under a death sentence. *In re Medley*, 134 U.S. 160, 172 (1890). As the Court explained, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place." *Id.*; *see also id.* (noting the "immense mental anxiety amounting to a great increase of the offender's punishment" that comes from the unpredictability of the execution date).

The Court's *Medley* decision flowed from views at the Founding. The Framers and members of the Founding generation "considered even delays of several months [of confinement under a death sentence] to be cruel and unusual—which reflected the prevailing view in England and the colonies at the time of America's independence." Brent E. Newton, *The Slow Wheels of* Furman*'s Machinery of Death*, 13 J.

App. Prac. & Process 41, 55–57 & nn.64–70 (2012) (summarizing views of George Washington, Thomas Jefferson, James Wilson, and John Marshall). Indeed, as a practicing lawyer in Virginia, John Marshall argued that "it is a Consideration of some weight . . . that the prisoner hath languished a long time in jail [awaiting execution], in a situation which must have added to the misories of imprisonment & the horrors of an execution, which agony alone hath suspended." The Papers of John Marshall, vol. II, 207–08 (Charles T. Cullen and Herbert A. Johnson, eds., U.N.C. Press 1977).

The Eighth Amendment, moreover, draws extensively from the English Declaration of Rights of 1689. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., plurality op.); *Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976). The English Declaration, in turn, has been interpreted to prohibit execution after excessive periods of confinement under a death sentence. *See, e.g., Lackey*, 514 U.S. at 1046-47 (Stevens, J., statement) (referring to the "conclusions by English jurists that 'execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights of 1689'" (citation omitted)).

The constitutional problems with excessive periods of confinement under a death sentence endure and are profound. Just last Term, Justice Breyer, joined by Justice Ginsburg, emphasized that "excessively long periods of time that individuals typically spend on death row, alive but under sentence of death" pose grave constitutional concern. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting, joined by Ginsburg, J.). "[A] lengthy delay in and of itself is especially cruel because it subjects death row in-

mates to decades of especially severe, dehumanizing conditions of confinement," including "uncertainty as to whether a death sentence will in fact be carried out" and "death warrants that have been issued and revoked, not once, but repeatedly." *Id.* at 2765-66.[11]

The constitutional problems with excessively long periods of confinement under a death sentence are severely aggravated where, as here (and as is common in death-penalty states), a prisoner on death row is kept alone in his cell for almost the entire day. "The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). Both the American Bar Association and the United Nations Special Rapporteur on Torture have sought to limit or ban solitary confinement. *See Glossip*, 135 S. Ct. at 2765 (Breyer, J., joined by Ginsburg, J., dissenting). Solitary confinement "bears 'a further terror and peculiar mark of infamy'" on prisoners on death row—bringing them "'to the edge of madness, perhaps to madness itself'" and "exact[ing] a terrible price." *Davis*, 135 S. Ct. at 2209-10 (Kennedy, J., concurring). Indeed, this Court long has recognized that solitary confinement aggravates the serious problems of extended confinement under a death penalty. *See Medley*, 134 U.S. at 171 (emphasizing "the solitary confinement to which the prisoner was subjected"); *id.* at 170 (explaining that, "[i]n Great

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[11] Foreign authority likewise supports the conclusion that execution after an excessive period of confinement under a death sentence is cruel and unusual. *See, e.g., Foster*, 537 U.S. at 992 (Breyer, J., dissenting) (citing decisions of foreign courts, including the UK Privy Council and the European Court of Human Rights).

Britain, as in other countries, public sentiment revolted against this severity" of solitary confinement under a death sentence). Notably, in this case, the CCA acknowledged, in its discussion of Moore's *Atkins/Hall* claim, that Moore, in his prolonged period of death-penalty confinement, has exhibited "withdrawn and depressive behavior." App. 71a; *see also, e.g.*, R01551 (highlighting Moore's inattentive and unresponsive behavior, which necessitated a mental health inpatient psychosocial evaluation).[12]

2. An excessive period of confinement under a death sentence violates the Eighth Amendment for an additional, independent reason: it furthers nei-

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[12] The CCA further acknowledged that, at one point during his prolonged confinement on death row, Moore actually sought to waive further appeals so that an execution date could be set (a request denied by the state habeas court). App. 46a-47a. The psychological toll of almost constant isolation led another death-row inmate at Polunsky to similarly request an execution date. *See Simpson v. Quarterman*, 341 F. App'x 68, 69-70 (5th Cir. 2009) (affirming a district court's determination that a Polunsky death-row inmate could proceed with execution and forego habeas review; recognizing inmate's statement that "being locked up in a [sic] isolated solitary cell of confinement 23/ and 24 hours per day isn't justice nor is it considered living – its cruel and unjust, therefore I'm really looking forward to my execution"); *see also* R00290-R00210, R003538 (Moore habeas submissions comparing the "similar[ity]" of his conditions to those in *Ruiz v. Johnson*, 154 F Supp. 2d 975 (S.D. Tex. 2001)); *Ruiz*, 154 F. Supp. 2d at 984–85 (noting the "extreme deprivations and repressive conditions of confinement" in the Texas solitary confinement units; concluding that Texas's solitary confinement units are "virtual[ly] incubators of psychoses—seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities"; and highlighting that "incidents of self-mutilation and incessant babbling and shrieking were almost daily events"), *appeal dismissed*, 273 F.3d 1101 (5th Cir. 2001).

ther of the objectives secured by the death penalty. This Court has identified "two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'" *Roper*, 543 U.S. at 571. And "[u]nless the death penalty when applied to those in [a particular prisoner's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982). Where, as here, there has been a prolonged period of confinement under a death sentence, actually carrying out the execution promotes neither deterrence nor retribution and, as a result, violates the Eighth Amendment.

First, executing a person in circumstances like those presented here does not further the death penalty's deterrence goals. Executing Moore after thirty-five years of imprisonment under threat of death penalty would yield little (or no) deterrent value above continued incarceration for life. *See, e.g.*, *Valle*, 132 S. Ct. at 2 (Breyer, J., dissenting) (deeming the "commonly accepted justifications for the death penalty . . . close to nonexistent in a case such as this one" and concluding that "[i]t is difficult to imagine how an execution following so long a period of incarceration [thirty-three years] could add significantly to that punishment's deterrent value"). Additionally, "the deterrent value of incarceration during that period of uncertainty [accompanying prolonged confinement under a death sentence] may well be comparable to the consequences of the ultimate step itself." *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring).

Second, execution after prolonged confinement under a death sentence fails to promote the aim of retribution. In the decades that pass after the commission of the crime and imposition of the death sentence, circumstances often change dramatically. In such a situation, life in prison likely fully accomplishes society's desire for retribution. *See, e.g.*, *Glossip*, 135 S. Ct. at 2769 (Breyer, J., joined by Ginsburg, J., dissenting).

The penological justifications for the death penalty are conspicuously attenuated—and even eliminated—after excessively long periods of confinement under a death sentence. Review is important to ensure that execution after inordinate time on death row does not take place when it lacks any legitimate societal value.

3. For several reasons, this Petition presents an especially compelling vehicle in which to resolve the often-posed but never-resolved question whether execution after a prolonged period of confinement under a death-penalty sentence violates the Eighth Amendment.

First, Moore has been confined under a death sentence since 1980—a remarkably long time even in an era of startlingly long periods of confinement on death row.

Second, Moore has been subjected to highly isolated "administrative segregation" for almost half that time.

Third, the principal causes of the extended period have been very substantial constitutional claims—nearly twenty years due to his successful claim that he was denied effective assistance of counsel in 1980, and at least twelve years due to his *Atkins* claim,

which prevailed before the state habeas court (which conducted the evidentiary hearing) and garnered a powerful dissent in the CCA (and failed in that court only because the court's decision conflicted with this Court's decisions, *see supra* pp. 12-26). Thus, Moore's extraordinarily long time on death row cannot be attributed to frivolous filings or litigation abuse.

Fourth, Moore also has been subjected to the signing and subsequent staying of two separate death warrants against him—one was stayed on the very day he was to be executed, and the other a mere five days before the scheduled execution. R02982-02983; R02901; *see, e.g., Thompson*, 129 S. Ct. at 1299 (Stevens, J.) (signing and staying of two death warrants produced "dehumanizing effects").

One additional point bears emphasis. This Petition gives the Court a straightforward opportunity to address the question presented without needing first to consider the high hurdles imposed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 3009. The case comes to the Court directly from state court and allows the Court to consider this fundamental issue on the merits.

In sum, this Court should decide whether execution after an extraordinarily long period of confinement under a death sentence comports with the Eighth Amendment's prohibition against cruel and unusual punishment. As individual Justices have explained, execution of a condemned individual in circumstances like Moore's is both cruel and unusual, and does not further the purposes of the death penalty. The Court should consider and resolve this important issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 15, 2015

APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for Writ of Habeas Corpus in Cause No. 314483-C in the 185th Judicial District Court Harris County

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JOHNSON, J., delivered the opinion of the Court in which KELLER, P.J., MEYERS, KEASLER, HERVEY and RICHARDSON, JJ., joined. ALCALÁ, J., filed a dissenting opinion. YEARY, J. concurred. NEWELL, J., did not participate.

OPINION

In 1980, appellant was convicted of capital murder and sentenced to death for fatally shooting a seventy-year-old grocery clerk, James McCarble, in Houston, Texas, while committing or attempting to commit robbery. *See* TEX. PENAL CODE ANN. § 19.03(a). We affirmed the 1980 conviction and sentence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985). Following a grant of federal habeas corpus relief, the trial court held a new punishment hearing in February 2001. Appellant again received a death

sentence. We affirmed the trial court's judgment on direct appeal. *Moore v. State*, No. AP-74,059, slip op. (Tex. Crim. App. Jan. 14, 2004) (not designated for publication).

In this initial writ application challenging his 2001 punishment retrial and death sentence, applicant raises forty-eight claims for relief. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071. In January 2014, the habeas judge held a two-day evidentiary hearing on applicant's first claim for relief—the allegation that he is intellectually disabled and therefore exempt from execution under the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).[1]

Following the evidentiary hearing, the parties filed proposed findings of fact and conclusions of law. Applicant's proposed findings and conclusions were contained in a document entitled, "Addendum Findings of Fact and Conclusions of Law on Claims 1-3" (Addendum Findings). Despite the document's caption, applicant's proposed findings and conclusions addressed only his *Atkins* claim (i.e., his first claim for relief). The State's proposed findings of fact and conclusions of law addressed all of applicant's alleged grounds for relief.

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[1] Mental-health advocates now generally favor the term "intellectually disabled" over the older term "mentally retarded," which they deem to carry pejorative connotations. *See Ex parte Cathey*, 451 S.W.3d 1, 4 n.4 (Tex. Crim. App. 2014). However, the terms refer to the same condition and may be used interchangeably. *See id.* In this opinion, we substitute the terms "intellectual disability" and "intellectually disabled" for "mental retardation" and "mentally retarded."

The habeas court signed applicant's proposed Addendum Findings. The Addendum Findings applied the definition of intellectual disability presently used by the American Association on Intellectual and Developmental Disabilities (AAIDD),[2] concluded that

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[2] The DSM-IV states the diagnostic criteria for intellectual disability as follows:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test . . .

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 46 (APA, 4th ed. 1994) (DSM-IV).

The DSM-V defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (APA, 5th ed. 2013) (DSM-V). The DSM-V states that the following three diagnostic criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing [Criterion A].

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social

applicant is intellectually disabled under that definition, and recommended that we grant relief on his *Atkins* claim. [3] The Addendum Findings also concluded that applicant had established by a preponderance of the evidence that he is intellectually disabled under the diagnostic criteria stated in the fourth and fifth editions of the American Psychiatric Association's (APA's) Diagnostic and Statistical Manual of Mental Disorders (DSM), i.e., the DSM-IV and DSM-V.

The habeas court also signed the State's proposed findings of fact and conclusions of law after making certain handwritten alterations to the final page. Through its alterations, the habeas court: (1) indicated that applicant's grounds for relief should be granted in part and denied in part; and (2) adopted the State's

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participation, and independent living, across multiple environments, such as home, school, work, and community [Criterion B].

C. Onset of intellectual and adaptive deficits during the developmental period [Criterion C].

See id. To meet the DSM-V's diagnostic criteria for intellectual disability, "the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A." *See id.* at 38.

[3] The AAIDD, which until 2007 was called the American Association on Mental Retardation (AAMR), is a professional non-profit association that advocates for the rights of the mentally impaired and those with developmental disabilities. *See Cathey*, 451 S.W.3d at 15 n.40. The AAIDD currently defines intellectual disability as a condition "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." INTELLECTUAL DISABILITY 5 (AAIDD AD HOC COMM. ON TERMINOLOGY AND CLASSIFICATION, 11th ed. 2010).

proposed findings and conclusions concerning claims four through forty-eight, as well as its recommendation that we deny relief concerning those claims. The habeas court made no findings or conclusions regarding applicant's claims two and three.

We filed and set the case to address applicant's *Atkins* allegation. We now deny relief on all of applicant's claims.

In *Atkins*, the Supreme Court determined that the execution of intellectually disabled individuals violates the Eighth Amendment, but left it to the States to develop appropriate ways to enforce the constitutional restriction. *See Atkins*, 536 U.S. at 317, 320. In *Ex parte Briseno*, citing the absence of legislation to implement *Atkins*'s mandate, we adopted the definition of intellectual disability stated in the ninth edition of the AAMR manual, published in 1992, and the similar definition of intellectual disability contained in section 591.003(13) of the Texas Health and Safety Code. *See Ex parte Woods*, 296 S.W.3d 587, 589 & n.4 (Tex. Crim. App. 2009); *Briseno*, 135 S.W.3d at 7.

Because our Legislature has not enacted legislation to implement *Atkins*'s mandate, we continue to follow the AAMR's 1992 definition of intellectual disability that we adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases. *See In re Allen*, __ S.W.3d __, __, Nos. WR-82,265-01 & WR-82,265-02, slip op. at *7–8 (Tex. Crim. App. May 13, 2015); *Woods*, 296 S.W.3d 587, 589. Thus, to demonstrate that he is intellectually disabled for Eighth Amendment purposes and therefore exempt from execution, an applicant must prove by a preponderance of the evidence that: (1) he suffers from significantly subaverage general intellectual functioning, generally

shown by an intelligence quotient (IQ) of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen. *See Ex parte Cathey*, 451 S.W.3d 1, 19 (Tex. Crim. App. 2014); *Ex parte Sosa*, 364 S.W.3d 889, 894 (Tex. Crim. App. 2012); *Briseno*, 135 S.W.3d at 7 n.25.

The habeas judge therefore erred by disregarding our case law and employing the definition of intellectual disability presently used by the AAIDD, a definition which notably omits the requirement that an individual's adaptive behavior deficits, if any, must be "related to" significantly sub-average general intellectual functioning.[4] The habeas court reasoned that, in *Briseno*, we derived our legal test for intellectual disability in capital cases from the AAMR's 1992 definition of intellectual disability. Because the AAMR's and APA's conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided, the habeas court concluded that it should use the most current position, as espoused byAAIDD, regarding the diagnosis of intellectual disability rather than the test that we established in *Briseno*.

It may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseno* were decided. Indeed, we have recently discussed the subjectivity surrounding the medical diagnosis of intellectual

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[4] The diagnostic criteria set forth in the DSM-IV similarly does not require that an individual's adaptive deficits be related to significantly sub-average intellectual functioning. *See* DSM-IV 46.

disability and some of the causes for that subjectivity. *See Cathey*, 451 S.W.3d at 10 & nn. 22–23. But although the mental-health fields and opinions of mental-health experts inform the factual decision, they do not determine whether an individual is exempt from execution under *Atkins*. *See id.* at 9–10 (stating that we must apply our own judgment on the appropriate ways to enforce the ultimately legal prohibition on executing intellectually disabled offenders). The decision to modify the legal standard for intellectual disability in the capital-sentencing context rests with this Court unless and until the Legislature acts, which we have repeatedly asked it to do. *See Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010); *see, e.g., Allen*, __ S.W.3d at __, Nos. WR-82,265-01 & WR-82,265-02, slip op. at *7–8. We conclude that, at this juncture, the legal test we established in *Briseno* remains adequately "informed by the medical community's diagnostic framework." *See Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).[5]

Regarding *Briseno*'s first prong, "general intellectual functioning" is "defined by the [IQ]" and "obtained by assessment with a standardized, individually administered intelligence test." *See Ex parte Hearn*,

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[5] We derived *Briseno*'s legal definition of intellectual disability from a medical definition that the AAMR had previously advocated. *See Woods*, 296 S.W.3d at 589 & 589 n.4; *Briseno*, 135 S.W.3d at 7 & n.26. *Briseno*'s legal definition remains generally consistent with the AAIDD's current definition of intellectual disability. Further, *Briseno*'s requirement—that any significant adaptive behavioral deficits be "related" to significantly subaverage general intellectual functioning—is consistent with the APA's current position on the issue. *See* DSM-V 38 (emphasizing that an individual's "deficits in adaptive functioning must be directly related to [his] intellectual impairments" to meet the diagnostic criteria for intellectual disability).

310 S.W.3d 424, 428 n.7 (Tex. Crim. App. 2010). There is a measurement error of approximately five points in assessing IQ, which may vary from instrument to instrument. *Id.* at 428. Therefore, when determining whether an applicant has met *Briseno*'s first prong, we consider the fact that any IQ score could actually represent a score that is five points higher or five points lower than the score that he actually obtained. *See id.*

In *Cathey*, we examined whether mental-health experts or factfinders should adjust IQ scores for the "Flynn Effect"[6] in making a determination of intellectual disability under *Atkins*. *See Cathey*, 451 S.W.3d at 14. We concluded that, although factfinders may consider the concept of the Flynn Effect in assessing the validity of a score obtained on a now "outmoded" or "outdated" version of an IQ test, they may consider that effect only in the way that they consider an IQ examiner's assessment of malingering, depression, lack of concentration, etc. *Id.* at 5, 18 n.54 (explaining that "outmoded" in this context "means simply that the test [at issue] was designed and normed several years earlier" and "not that there was a newer, 'better' test available" at the time). We stated that the IQ test score itself may not be changed. *Id.* at 18. In analyzing whether applicant's general intellectual functioning is significantly sub-average, the habeas court therefore erred by subtracting points from applicant's IQ scores for the Flynn Effect and considering both applicant's unadjusted and Flynn-Effect-adjusted IQ scores.[7]

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[6] The "Flynn Effect" refers to the tendency of scores on IQ tests normed on a particular date to increase over time, as the tests' norms age. *See Cathey*, 451 S.W.3d at 12 -- 13.

[7] We recognize that the habeas court did not have the benefit of our opinion in *Cathey* when it entered its Addendum Findings.

For purposes of the Eighth Amendment, "adaptive behavior" refers to the ordinary skills that are required for people to function in their everyday lives. *Id.* at 19. We have cited with approval the AAIDD's grouping of adaptive behavior into three areas (conceptual skills, social skills, and practical skills) for purposes of making a clinical diagnosis of intellectual disability.[8] *See Hearn*, 310 S.W.3d at 428. Limitations in adaptive behavior can be determined by using standardized tests. *See id.* We have also recognized the APA's position, expressed in the DSM-IV, that for purposes of clinical diagnosis, a "significant limitation" is defined by a score of at least two standard deviations below either (1) the mean in one of the three adaptive behavior skills areas or (2) the overall score on a standardized measure of conceptual, social, and

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However, neither the record in applicant's case nor the law on which the habeas court relied support its findings and conclusions concerning the Flynn Effect. In particular, the record does not support the habeas court's representation of the AAIDD's present stance on the Flynn Effect. *See* INTELLECTUAL DISABILITY 35, 37 (describing the Flynn Effect as one of the "challenging issues" in the measurement of intelligence and interpretation of IQ scores, and noting the limited circumstances in which the AAIDD approves of adjusting an IQ score downward for the Flynn Effect).

[8] In *Hearn*, we noted the AAIDD's breakdown of these behavioral areas:

> Conceptual skills include skills related to language, reading and writing, money concepts, and self-direction. Social skills include skills related to interpersonal relationships, responsibility, self-esteem, gullibility, naivete, following rules, and avoiding victimization. Practical skills are skills related to activities of daily living and include occupational skills and maintaining a safe environment.

Hearn, 310 S.W.3d at 428 n.9.

practical skills. *See id.* Although standardized tests are not the sole measure of adaptive functioning, they may be helpful to the factfinder, who has the ultimate responsibility for determining intellectual disability in the *Atkins* context. *See id.*

In the Eighth Amendment context, it is not sufficient for an applicant to establish by a preponderance of the evidence that he has significantly subaverage general intellectual functioning and significant limitations in adaptive functioning. *See id.* An applicant must also demonstrate by a preponderance of the evidence that his adaptive behavior deficits are related to significantly sub-average general intellectual functioning rather than some other cause. *Cf. id.* (stating that the applicant must show that his adaptive deficits were related to significantly subaverage general intellectual functioning rather than a personality disorder); ***Ex parte Blue***, 230 S.W.3d 151, 163–64 (Tex. Crim. App. 2007) (determining that the applicant had not made a prima facie case concerning adaptive deficits because his expert conceded that learning disabilities or an impoverished family background, or both, may have been responsible for applicant's alleged deficit). The habeas court in this case failed to make the relatedness inquiry.[9]

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[9] The habeas court concluded that applicant was intellectually disabled under the DSM-V's diagnostic criteria. As we have discussed, *Briseno* is the applicable standard for the *Atkins* determination. But like *Briseno*, the DSM-V requires that an individual's adaptive behavior deficits are directly related to his significantly sub-average intellectual functioning. Because the habeas court did not engage in the relatedness inquiry, the record does not support its finding that applicant meets the DSM-V's diagnostic criteria.

In making the relatedness determination, the factfinder may consider the seven evidentiary factors that we developed in *Briseno*:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9. We look to the entirety of the record before us in an *Atkins* inquiry. *See Cathey*, 451 S.W.3d at 26–27 (stating that factfinders should "consider *all* possible data that sheds light on a person's adaptive functioning, including his conduct in a prison society, school setting, or 'free world' community"). In addition, we "consider *all* of the person's functional abilities," including "those that show strength as well as those that show weakness."

See id. at 27. The habeas court therefore additionally erred to the extent that it found that applicant's prison records were "not appropriate tools by which to exclude intellectual disability in capital murder cases" and considered only weaknesses in applicant's functional abilities. *See id.*

In failing to make the relatedness inquiry, the habeas judge's factual findings and legal conclusions left the second prong of the *Briseno* test unresolved. *See Ex parte Flores*, 387 S.W.3d 626, 634–35 (Tex. Crim. App. 2012) (stating that the rationale for the deference we generally accord to habeas courts disappears when the factual findings fail to resolve the necessary factual issues). In addition, our independent review of the record reveals that it does not support the habeas judge's findings or conclusions concerning applicant's Atkins claim. *See id.* (noting that the rationale for deference also disappears when the record does not support the habeas court's findings). In short, the habeas judge appears to have either not considered, or unreasonably disregarded, a vast array of evidence in this lengthy record that cannot rationally be squared with a finding of intellectual-disability. *Cf. Sosa*, 364 S.W.3d at 894. For these reasons, we do not adopt the habeas court's findings and conclusions regarding applicant's *Atkins* claim, but instead assume our role as the ultimate factfinder in this case. *See Flores*, 387 S.W.3d at 634–35; *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

We hold that applicant has not established by a preponderance of the evidence that he is intellectually disabled under *Atkins* and *Briseno*. Accordingly, applicant is not exempt from the death penalty, and we deny him relief on his first ground.

I. Factual and Procedural Background

The lengthy factual and procedural history of applicant's case is relevant to our adjudication of his *Atkins* claim and provides context for the testimony elicited by the parties at his 2014 evidentiary hearing.

A. Applicant's 1980 Capital Murder Trial

The evidence at applicant's 1980 trial showed that, on April 25, 1980, Anthony Pradia and Willie Albert "Ricky" Koonce visited applicant at Betty Nolan's house,[10] where applicant lived when he was not staying with his girlfriend, Shirley Carmen. Pradia testified that he, Koonce, and applicant each needed money for car payments. While the three men were playing dice, Koonce suggested that they commit a robbery, and Pradia and applicant agreed. Applicant provided the weapons for the robbery, specifically, a shotgun and a .32 caliber pistol. Applicant and Pradia hid the weapons in the trunk of Koonce's car. The three men then drove around various areas of Houston in Koonce's car, looking for a place in which to commit the robbery.

After taking turns casing the Birdsall Super Market, the three men settled on it as the place in which they would commit the robbery and negotiated how they would divide the proceeds. Because they were using his car, Koonce wanted a larger share of the proceeds. After some argument, Pradia and applicant agreed that they would each pay Koonce $200 from their shares. The men then discussed their roles in the robbery. They agreed that Koonce would

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[10] Applicant and various other witnesses at his 1980 trial described Nolan as applicant's "play mother" or "play aunt." In 1980, applicant's trial counsel described a "play mother" as someone "that a young man in the black community turn[s] to in times of need."

enter the courtesy booth and take the money that was inside. Applicant would carry the shotgun and position himself at the courtesy booth so that he could guard the booth and watch the store's front entrance. Pradia would carry the pistol and empty the checkout registers.

The three men then entered the store. Pradia entered first, with the pistol in his pants. Koonce entered next. Applicant entered last.[11] The shotgun he was carrying was obscured by two plastic bags. Applicant and Pradia wore wigs. Applicant also wore sunglasses.

Applicant and Koonce approached the courtesy booth, which was staffed by store employees McCarble and Edna Scott. Koonce entered the booth, told McCarble and Scott that they were being robbed, and demanded money. Applicant, who by this time had removed the plastic bags from the shotgun, pointed the weapon at McCarble and Scott through the booth's window. When Scott screamed that the store was being robbed, applicant pointed the shotgun at McCarble, looked down the barrel, and shot him in the head. McCarble died instantly.

Applicant, Pradia, and Koonce ran from the store and got back into Koonce's car, where applicant stated

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[11] In a written post-arrest statement dated April 28, 1980, Koonce asserted that applicant wanted to walk behind him so that no one would see the shotgun that applicant was carrying. Koonce did not testify at applicant's 1980 trial and his statement was not offered into evidence at that proceeding. However, in 1992, applicant filed his second application for a writ of habeas corpus pursuant to Article 11.07. The State included Koonce's statement as an exhibit to its response.

that he had shot the man in the booth.[12] The men fled the scene. Koonce drove back to Nolan's house to drop applicant off and to allow Pradia to retrieve his car. The men then split up. Applicant spent the night of the offense at Nolan's house.

Witnesses provided a license-plate number and descriptions of the getaway vehicle and perpetrators, which quickly led Houston Police Department (HPD) homicide detectives to arrest Koonce. While searching Koonce's vehicle, officers discovered Pradia's wallet and identification, which Pradia had inadvertently left behind. Following Koonce's arrest, Pradia turned himself in. Based on information in Koonce's and Pradia's statements, detectives obtained a warrant for applicant's arrest. During a consensual search of Nolan's house, investigators found a shotgun hidden between the mattress and box springs of applicant's bed.

Applicant, who left Houston on the day after Koonce gave his statement, remained at large. HPD detectives were unable to ascertain applicant's whereabouts until May 2, 1980, when they received a tip that he could be found at his grandmother's residence in Louisiana. On May 5, 1980, ten days after the offense, Louisiana authorities arrested applicant at his grandmother's house pursuant to a fugitive warrant. Incident to the arrest, Louisiana officers discovered a small suitcase containing a pistol and $612 in cash. Applicant, who previously had a full head of hair, had shaved his hair down to the scalp.

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[12] According to Koonce's statement, *see supra* note 11, applicant asserted that he shot McCarble because he believed that McCarble had been reaching for a gun.

HPD detectives traveled to Louisiana, took applicant into custody, and returned him to Houston. In Houston, applicant gave a written statement in which he admitted to participating in the robbery and to killing McCarble, although he asserted that McCarble's death was accidental.[13] According to applicant, during the screaming and panic that ensued after Scott cried out, he "suddenly fell backwards and the butt of the gun hit [his] arm and the gun went off." Applicant claimed that he later learned that the man in the booth had been shot. Applicant "[swore that he] was not trying to kill the old man and the whole thing was a[n] accident."

Applicant testified twice at his trial, first at a hearing on his motion to suppress his statement and later during the defense's guilt-innocence case-in-chief. The State cross-examined applicant on both occasions. At the suppression hearing, applicant denied giving or signing the statement. He asserted that one or more of the interrogating officers had beaten him when he refused to cooperate. Although he acknowledged that his signature was on the statement, applicant argued that his interrogators must have traced it from a blank piece of paper that

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[13] The record shows that this was not the first account of the offense that applicant gave to law-enforcement authorities. At applicant's 2001 punishment retrial, former Louisiana State Trooper Charles Webb II testified that he participated in applicant's May 5, 1980, arrest in Louisiana. Webb stated that, before Texas detectives arrived, he administered *Miranda* warnings to applicant and conducted a tape-recorded interrogation. Webb testified that applicant made an oral statement in which he admitted participating in the robbery, but denied being the shooter.

he signed after being told that he would be released if he did so.

When he later testified in front of the jury, applicant again denied giving or signing the statement. Applicant testified that he was "quite sure" that someone who had been to prison before (as he had) would know better than to sign a confession. Applicant also denied any involvement in the offense, asserting that he was in Louisiana when the robbery and McCarble's death occurred. Applicant's eldest sister, Clara Jean Baker, also testified for the defense and corroborated applicant's alibi.

With the third perpetrator's identity at issue, the State presented rebuttal evidence that applicant had committed robberies at two other grocery stores just days before McCarble's murder. The earlier robberies occurred in a similar manner to the robbery in which McCarble died, with applicant wielding a shotgun and guarding the stores' courtesy booths while accomplices took money.

The jury found applicant guilty of capital murder. At the punishment phase, pursuant to applicant's stipulation, the State introduced his penitentiary packet. The penitentiary packet showed that applicant had four 1977 felony convictions (three for burglary of a habitation with the intent to commit theft and one for aggravated robbery) for offenses he committed in December 1976 and January 1977. Before accepting the stipulation, the trial court questioned applicant directly to determine whether his stipulation was voluntary, knowing, and intelligent.

Applicant's trial counsel did not call any witnesses or present any evidence at the punishment phase.

Based on the jury's answers to the special issues, the trial court sentenced applicant to death.

B. Applicant's Initial Direct Appeal

The trial court appointed Richard Bonner, one of applicant's trial counsel, to represent applicant on direct appeal. After receiving multiple extensions of time, Bonner filed an appellate brief for applicant in July 1983.

Between October 1980 and July 1983, the trial court and this Court received numerous *pro se* motions and pleadings from applicant. The documents concerned applicant's desire to participate in his appeal; need for access to the record; growing displeasure with Bonner's appellate representation; and dissatisfaction with the trial court's failure to appoint another attorney or to allow applicant to represent himself on appeal pursuant to *Faretta v. California*, 422 U.S. 806 (1975). In October 1983, applicant's dissatisfaction culminated with his filing of a *pro se* petition for a writ of mandamus, in which he asked us to require the trial court to dismiss Bonner and to allow applicant to represent himself on appeal.

We remanded the case to the trial court for a *Faretta* hearing, which the trial court held on November 2, 1983. *See Ex parte Moore*, No. WR-13,374-01 (Tex. Crim. App. Oct. 5, 1983) (not designated for publication). George L. Walker, the 1980 trial judge, presided. Applicant advocated on his own behalf and presented five exhibits in support of his request to proceed *pro se*. Applicant's exhibits, which were admitted into evidence, included letters that he had written to Bonner regarding the appeal.[14] At the

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[14] In addition to correspondence between applicant and Bonner regarding the appeal, applicant's exhibits included

hearing, applicant read several of those letters aloud without any apparent difficulty. When it became evident that applicant was unaware that Bonner had filed a brief, the trial court recessed the hearing for an hour to allow applicant to review the pleading. When the hearing resumed, the trial court questioned applicant to ascertain whether he understood and was satisfied with the legal issues that Bonner had raised. Applicant responded rationally and coherently, although he struggled somewhat to explain Bonner's legal arguments to the trial court. At the hearing's conclusion, after applicant reaffirmed that he was willing to accept new appellate counsel, the trial court allowed Bonner to withdraw and appointed John H. Ward. After considering the claims raised by Bonner and Ward, as well as claims raised by applicant in a "Supplemental *Pro-Se* Brief For The Appellant," filed-stamped February 26, 1985, we affirmed the conviction and sentence. *Moore v. State*, 700 S.W.2d 193, 195 (Tex. Crim. App. 1985). The trial court set applicant's execution for February 26, 1986.

C. Applicant's Previous State and Federal Habeas Proceedings

In February 1986, the Supreme Court denied applicant's out-of-time petition for a writ of certiorari and application for a stay of execution filed through

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correspondence between applicant, who is African American, and an attorney for the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund regarding Bonner's many requests for additional time to file a brief; correspondence between the NAACP attorney and Bonner concerning Bonner's delay in filing an appellate brief for applicant; applicant's *pro se* pleadings in the trial and other courts; and a docket sheet from this Court showing multiple extension requests filed by Bonner and *pro se* motions filed by applicant.

new appellate counsel, Carolyn Garcia. *See Moore v. Texas*, 474 U.S. 1113 (1986). We subsequently denied applicant leave to file an application for an original writ of habeas corpus, denied his first application for a writ of habeas corpus filed pursuant to Article 11.07, and denied his accompanying motion for a stay of execution. *See Ex parte Moore*, No. WR-13,374-02 (Tex. Crim. App. Feb. 25, 1986) (not designated for publication) (original writ application); *Ex parte Moore*, No. WR-13,374-03 (Tex. Crim. App. May 19, 1986) (not designated for publication) (first Article 11.07 application).

After we denied the motion for stay of execution, applicant's counsel filed a petition for a writ of habeas corpus and motion for a stay of execution in federal district court. The federal district court granted a stay. In June 1987, after determining that applicant's petition contained an unexhausted claim, the federal district court dismissed applicant's petition without prejudice to refiling upon exhaustion of the claim in state court. *See Moore v. Johnson*, 194 F.3d 586, 601 (5th Cir. 1999).

On April 6, 1992, now represented by attorneys Rick G. Strange, Richard R. Fletcher, and Kristi Franklin Hyatt, applicant filed his second Article 11.07 application. In relevant part, applicant alleged that trial counsel rendered ineffective assistance by pursuing an alibi defense and, in furtherance of that defense, persuading applicant and his sister, Clara Jean Baker, to perjure themselves at the 1980 trial. Applicant further alleged that trial counsel were ineffective for failing to investigate, discover, and present mitigating evidence at the punishment phase. Relying in part on *Penry v. Lynaugh*, 492 U.S. 302 (1989), which the Supreme Court decided after his

federal habeas petition's dismissal, applicant for the first time alleged that trial counsel should have discovered and presented evidence that he experienced a troubled childhood, as well as evidence that his intellectual functioning fell in the intellectually disabled or borderline range. To support the allegations, habeas counsel attached some of applicant's school and prison records, as well as affidavits executed in 1992 by three of applicant's siblings (Clara Jean Baker, Colleen McNeese, and Ronnie Moore) and applicant's brother-in-law, Larry Baker.

The school records attached to applicant's 1992 writ application included his academic, attendance, and cumulative health records, as well as scores that he obtained on the Iowa Test of Basic Skills (ITBS) given in third through sixth grades. The records also included the report of applicant's 1965 pre-kindergarten school medical examination. The examining doctor recommended psychological testing, commenting, "Child is very withdrawn—maybe retarded but most likely emotional problems."

The school records additionally included two IQ scores. In 1971, when he was twelve years old and in fifth grade, applicant obtained an IQ score of 77 on an Otis-Lennon Mental Abilities Test (OLMAT). When he was thirteen years old and in sixth grade, applicant was referred to Marcelle Tucker, M.Ed., for a psychological evaluation because he was performing below grade level, was withdrawn, and took no part in class unless called upon. In her report, Tucker stated that, on January 24, 1973, she gave applicant a Wechsler Intelligence Test for Children (WISC) and two tests of perceptual-motor coordination, specifically, a Bender Visual Motor Gestalt (Bender Gestalt)

test and a Goodenough Draw-a-Man test.[15] Tucker reported that applicant obtained a full scale IQ score of 78 on the WISC and "mental age" scores of eight years, eleven months on the Bender Gestalt and nine years, six months on the Goodenough.

Tucker noted in her report that applicant was then attending his third elementary school. In describing applicant's appearance and test behavior, Tucker described him as "nice looking" and "neatly dressed -- very up-tight -- did not use left hand even to hold paper when it skidded." In remarks concerning applicant's test results, Tucker again noted his test behavior: "During testing, [applicant] was extremely controlled. He made only the barest minimum of movements. His answers were given in as few words as possible." Tucker continued:

> The disparity between [the] "Information" (4) and "Comprehension" (8) [subtests] on the WISC indicated that perhaps this is a child who has not been taught, but who can learn.
>
> Low scores on the Bender and Goodenough [tests] seem to be negated by the average scores on "Block Design" (9) and "Object Assembly" (9) [subtests] on the WISC.

Tucker recommended that applicant stay in regular classes, but suggested that the school modify his

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[15] Witnesses variously refer to the Goodenough Draw-a-Man test administered to applicant by Tucker in 1973 (sixth grade) as "the Goodenough," "the Draw-a-Man," and "the Draw-a-Person." For consistency, we refer to the test as "the Goodenough." We note that the record shows that applicant also took a Goodenough test in first grade. Unless otherwise specified, references to "the Goodenough" in this opinion refer to the 1973 test.

program by using certain specific teaching techniques to strengthen his areas of academic weakness.

The Texas Department of Criminal Justice (TDCJ) records attached to applicant's 1992 writ application included a February 28, 1984 report of applicant's psychological evaluation by psychologist George Wheat. Wheat stated that he was conducting the review at the request of the Psychological Screening Committee to assist it with determining applicant's work-capable status.[16] Wheat stated that applicant self-reported "fairly regular [past] employment as [a] construction laborer and clothing sales clerk." Wheat also noted that applicant was neatly dressed and exhibited no hesitancy in answering questions. He stated that applicant's responses "were appropriate to his 9th grade educational level and indicated [an estimated full scale] IQ of 71." Wheat concluded that applicant was work-capable.

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[16] In anticipation of the 2014 evidentiary hearing, the State filed applicant's complete TDCJ records. Those records included a Psychological Review Committee report of its January 11, 1984, interview with applicant, who was then twenty-four years old, to determine his work capability. The report and associated test forms reflected that applicant had been preliminarily screened with a psychological interview; an abbreviated Wechsler Adult Intelligence Scale-Revised (WAIS-R), on which he obtained an estimated full scale IQ score of 71; and a Minnesota Multiphasic Personality Inventory (MMPI), a personality test, which "revealed a valid profile which was consistent with significant probability of psychiatric disturbance. [Two-point-high] scale elevations were found on the psychotic scales." Based on its interview with applicant and his MMPI result, the committee found that applicant was "not psychologically clear" and ordered "[a] formal psychological and psychiatric work up." Wheat's evaluation followed.

The TDCJ records attached to applicant's 1992 application also showed that, in January 1989, following an internal quality-assurance audit, applicant was given a complete WAIS-R by a TDCJ psychologist. Applicant, who was thirty years old at the time, obtained a full scale IQ score that was reported as "not [falling within the] retarded range." The record currently before us shows that applicant obtained a full scale IQ score of 74 on the 1989 WAIS-R.

The habeas court held an evidentiary hearing on April 23, 1993, to address applicant's ineffective-assistance allegations. Judge Carl Walker Jr. presided. Dr. Robert J. Borda, a clinical neuro-psychologist, reviewed applicant's school and TDCJ records and testified for applicant. Borda stated that applicant's scores on the 1973 WISC and 1989 WAIS-R fell within the borderline range of intelligence (70–79) but asserted that applicant's "mental age" at the time of the offense was no greater than fourteen years.[17] Borda further asserted that applicant's failure to reach for falling papers during Tucker's 1973 WISC testing was unusual and consistent with behavior sometimes seen in brain-injured people. However, Borda acknowledged that the records he reviewed did not mention a head injury.

Despite his opinions regarding applicant's mental age at the time of the offense, Borda did not purport to diagnose applicant as intellectually disabled. Borda testified that IQ tests were developed to measure a

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[17] At the 1993 hearing, Borda testified that "[m]ental age is the individual's intellectual functioning at any particular point in time referenced to what would be the average performance for a given age." He stated that IQ scores were originally defined as a person's "mental age divided by the chronological age in months typically times 100."

person's potential to succeed in an academic setting and acknowledged that someone who obtained IQ scores in the borderline range of intelligence might well be capable of functioning successfully in the everyday world. On cross-examination, the State asked Borda whether applicant was capable of formulating complex arguments concerning his trial representation. Borda testified that, based on the documents he had reviewed, he "[saw] nothing that would indicate that [applicant] has really severe deficits in communication skills. I think he's . . . able to communicate adequately."

Applicant's sisters, Clara Jean Baker and Colleen McNeese, and his brother-in-law, Larry Baker, also testified at the 1993 evidentiary hearing. [18] They testified that applicant's father, Ernest Moore Jr. ("Junior"), was a neglectful, physically and verbally abusive alcoholic who beat his wife, Marion, and their nine children, and threw applicant out of the family home when he was fourteen years old.

Clara Jean testified that applicant would watch their parents when they fought, which was often. Clara Jean asserted that applicant's observation made Junior angry and caused him to beat applicant. Clara Jean stated that Junior also beat applicant because applicant tried to protect the other children.

McNeese asserted that, although Junior beat her and her other brothers, he beat applicant the most. She testified that Junior threw applicant out of the house because applicant could not spell and Junior

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[18] To distinguish Clara Jean and Larry Baker, we refer to them by their first names.

thought he was stupid.[19] McNeese stated that, after applicant was thrown out of the house, she and her siblings would sneak food to him at night until Junior discovered what they were doing and made them stop. McNeese acknowledged that Junior also forced her and her other brothers to leave home.[20]

Larry, who lived next to the Moore family as a teenager, stated that he had seen Junior strike applicant, as well as two of applicant's brothers. Larry testified that he could otherwise tell that applicant was suffering from some sort of physical abuse because applicant had bruises and appeared hungry, haggard, and unrested. Larry said that applicant was generally secretive about the abuse and reluctant to discuss his family situation, but he did talk to Larry about it a couple of times.

Concerning the allegation that Bonner was ineffective as trial counsel by suborning perjury, Clara Jean testified that her family retained Bonner after learning his name from a young woman whom applicant was dating at the time. Clara Jean admitted that she lied at the 1980 trial when she testified that applicant was with her in Louisiana at the time of the

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[19] Although Ronnie Moore, the youngest of applicant's brothers, executed an affidavit in 1992 in support of applicant's ineffective-assistance claims, he did not testify at the 1993 hearing. In his 1992 affidavit, Ronnie stated that Junior forced applicant to leave home at age fourteen because applicant told Junior to stop beating their mother.

[20] In her 1992 affidavit, McNeese stated that the Moore children grew up in extreme poverty and that there never seemed to be enough to eat. She asserted that she and applicant twice suffered ptomaine poisoning after scavenging food from the trash. McNeese stated that, after the food-poisoning incidents, applicant solicited odd jobs from neighbors when he and his siblings were hungry and bought food with the money he earned.

offense. Clara Jean asserted that she lied because Bonner convinced her it was necessary for applicant to avoid the death penalty and because she wanted to help applicant.

Applicant also testified at the 1993 evidentiary hearing and was cross-examined. Regarding the allegation that trial counsel suborned perjury, applicant admitted that he signed the written statement offered against him at the 1980 trial and asserted that the statement recounted the offense exactly as it happened. Applicant stated that, although he also told trial counsel the truth about the offense, they advised him to testify at trial and deny giving the confession, which he did.

Applicant also testified that, after his arrest, he falsely told another inmate that he had a cache of jewelry. Applicant surmised that trial counsel heard the story because they spontaneously asked him if the story were true and wanted to know the jewelry's location and worth. Applicant stated that trial counsel implied that giving them the jewelry could increase his chances of a life sentence. To secure a good effort from trial counsel, applicant maintained the lie, telling counsel that the hidden jewelry was worth close to $1 million. Applicant initially avoided specifying a location for the jewelry by telling counsel that he did not think it would be a good idea to disclose it to them. Eventually, applicant told counsel that the jewelry was at his grandmother's house in Louisiana.

Regarding his background, applicant testified that his father, Junior, was an alcoholic who physically abused him as a child and threw him out of the house permanently at age fourteen. Applicant stated that he was beaten and ejected from the family home because he tried to prevent Junior from beating Marion.

Applicant stated that he needed to find a way to survive after Junior permanently threw him out of the house. Because it was difficult to simultaneously care for himself and attend school, he dropped out and became part of "street life." Applicant testified that he frequented pool halls and similar establishments; slept in the restroom or back of the pool hall; did not immediately try to live with anyone else because his siblings were helping him without their father's knowledge; obtained food by stealing it from stores; and later moved in with a friend.

Applicant testified that school had been difficult for him. As a student, he "really couldn't comprehend words as most kids would" and "it was difficult for [him] to read and write." Applicant asserted that he still had problems with reading and writing, but since being imprisoned, he had spent a lot of time studying and trying to develop himself. As a result, his skills had improved. When shown State's Exhibit 1, a typewritten *pro se* pleading titled, "Supplemental *Pro-Se* Brief For The Appellant," which was filed-stamped February 26, 1985, and a handwritten cover letter addressed from applicant to the Harris County Clerk, applicant testified that the brief looked familiar to him as a document that someone had helped him prepare. He stated that he knew the contents and purpose of the document and that he had a part in researching it.[21]

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[21] At the 1993 hearing, McNeese acknowledged that applicant wrote to her from prison and that she would recognize his handwriting and signature. She identified applicant's handwriting in the cover letter.

Bonner testified at the hearing and denied the allegations made against him.[22] Bonner stated that applicant insisted before and throughout trial that he had an alibi and that counsel pursue such a defense. Bonner said that he spent a great deal of time talking with applicant during the course of his trial representation and that their conversations included discussions of trial strategy. Bonner never received the impression that applicant failed to understand the gravity of his situation or was unable to assist in his own defense; Bonner opined that applicant had assisted counsel very well.

On August 31, 1993, the habeas court entered findings of fact and conclusions of law and recommended that we deny relief on applicant's allegations. We determined that the record supported the habeas court's findings and conclusions and denied relief. *See Ex parte Moore*, No. WR-13,374-04 (Tex. Crim. App. Oct. 4, 1993). Meanwhile, the trial court set applicant's execution date for October 26, 1993.

On October 12, 1993, applicant filed his second petition for a writ of habeas corpus in federal court, raising the same claims that he advanced in his second Article 11.07 writ application. *See Moore*, 194 F.3d at 602. He additionally filed a motion for stay of execution, which the federal district court granted. In 1995, the federal district court found that trial counsel performed deficiently at both phases of trial, but that applicant suffered prejudice only as to punishment. *See Moore v. Collins*, No. H-93-3217, slip op. at 32 (S.D. Tex. Sept. 29, 1995). In 1999, the Fifth Circuit

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[22] The record shows that applicant's other trial attorney, C.C. Devine, died shortly after applicant's 1980 trial and that, by the time of the 1993 evidentiary hearing, Bonner had been disbarred for reasons unrelated to his representation of applicant.

Court of Appeals affirmed the federal district court's determination that applicant was entitled to punishment relief. *See Moore*, 194 F.3d at 622.

D. 2001 Punishment Retrial

In February 2001, the trial court held a new punishment trial. The current habeas judge, Susan Baetz Brown, heard certain pretrial matters, but Judge Larry Fuller presided over jury selection and the evidentiary portion of the punishment retrial.

At trial, the State reintroduced the evidence that it had presented at the guilt-innocence and punishment phases of applicant's 1980 trial. It also introduced applicant's disciplinary reports for the period he was confined on death row before his original death sentence was vacated.

Those reports showed that, on June 24, 1983, after showering, applicant stopped at a cell to talk to another inmate and ignored three orders to return to his own cell. After refusing the third order, applicant told the reporting officer, "[Y]ou can't tell me what to do, come on out from behind those bars and make me get in my cell. You aren't man enough to put me down." During a later security check at applicant's cell, applicant told the officer, "[Y]ou get out from in front of my cell, you motherfucker, I wish these bars weren't here." On September 23, 1983, while being let out for recreation, applicant stopped at four different cells to talk to other inmates and ignored eleven orders by the escorting guard to proceed.

On January 23, 1984, applicant ignored orders to stop talking to another inmate and enter the day room. On March 9, 1984, applicant failed to report to his assigned work. When confronted, applicant falsely stated that an officer had given him the day off.

On April 18, 1986, applicant was found to possess a large quantity of pills for which he did not have a prescription. On April 23, 1986, when ordered to shave, applicant told the guard that everyone knew that he had a shaving pass. When ordered to show the pass, applicant refused. On October 3, 1986, while giving inmates their meal, a guard ordered applicant to move from a bench in the day room to a table. Applicant stood up, stated that he "just had to fuck with somebody," and then refused an order to return to his bunk.

On January 3, 1987, applicant refused an order to get a haircut, stating, "I'm not going to get one." On January 22, 1987, applicant was among a group of inmates brought to the day room and told to sit down facing the wall. Applicant created a disturbance by jumping up and yelling, "[F]uck this, we don't have to do this," and trying to get the other inmates in the day room to join him. When ordered to sit, applicant repeated, "No! [W]e don't have to do this!" As the guard approached him, applicant returned to the spot where he had been sitting but refused to sit down. Ultimately, the guard grabbed applicant by both arms and placed him face down on the day-room floor.

On November 17, 1987, a prescription-only pill was found in applicant's cell, wrapped in toilet paper. Applicant did not have a prescription for the medication. On June 23, 1988, applicant refused an order to shave, citing a medical condition.

On September 6, 1990, a stinger (an altered electrical cord used to boil water) was found in applicant's cell. On August 12, 1992, applicant, who was working as a death-row porter, refused an order to clean up a spill in the main hallway. He stated that it was not his job because he was a death-row porter,

not a hall porter. On March 30, 1995, applicant was found to possess matches and rolling papers, which inmates were prohibited from having.

Applicant did not testify at his punishment retrial. However, the defense called nine of applicant's family members to testify about applicant's background and the changes they had seen in applicant since he had been imprisoned on death row.

Marion Moore, applicant's mother, testified that the family had financial problems. She stated that she worked forty hours per week outside the home when applicant was small and that her husband, Junior, worked construction jobs on and off. She testified that Junior developed a drinking habit and would become frustrated with the children when he had been drinking. Marion testified that, in December 1971, applicant was hit in the head by a brick when he was on a school bus and that he received medical treatment for the injury a few days later.

Larry Baker gave testimony similar to that which he gave at the 1993 evidentiary hearing concerning Junior's verbal and physical abuse of the Moore children. Regarding Junior's verbal abuse, Larry elaborated that Junior treated the male Moore children differently than the female children. Larry stated that Junior would tell all of his sons that they were "worthless" and "no good."

When asked to describe what kind of person applicant was between the ages of thirteen and seventeen, Larry testified that applicant was athletic, had a dog and "really had a special relationship with it," and "was a quiet kind of guy sometimes." Larry asserted that he had seen changes in applicant since that time. Larry stated that he "felt initially that

[applicant] was not as intelligent as he ha[d] displayed lately." Larry said that applicant "shows advance [sic] toward intelligence. He reads a lot. His handwriting is excellent. His grasp of vocabulary has improved considerably. His presentation of himself is much better."

McNeese testified that the Moore family moved a lot and that they had been evicted on one occasion. As to Junior's physical abuse of applicant, McNeese gave testimony similar to that which she gave at the 1993 evidentiary hearing. She again acknowledged that Junior beat all of the children, but testified that Junior treated applicant differently from her other brothers and said that applicant did not seem like he was Junior's son.

McNeese also testified that she and applicant attended the same schools when they were young. She said that they first attended Atherton Elementary, at which the student body was predominately black. When applicant was about twelve, as part of a racial integration effort, they were bussed to Scroggins Elementary. McNeese testified that "it was really hard for us to attend [Scroggins] because the people didn't want us there." She testified that, when they were first attending Scroggins, applicant was hit in the head with a brick because the other students wanted them off the bus. She said that applicant missed school because of the brick incident.

McNeese, who is about eleven months younger than applicant, testified that she and applicant were placed in the same classroom at Scroggins so that she could help him. McNeese stated that applicant did not respond to the teachers, who did not realize that he could not read, and he would not participate in anything. McNeese attributed applicant's behavior in

class to the fact that he did not understand what was going on. She said that she overheard teachers discussing applicant and asking each other whether he were intellectually disabled or had a hearing problem. McNeese testified that when she was doing seventh-grade-level work, the teachers would give applicant third-grade-level work to do, and she would stay after class to help applicant with it.

McNeese testified that Hester House, a community center serving Houston's Fifth Ward, was a place where she and her siblings escaped from their situation. McNeese thought that applicant did better at Hester House than at school because "[i]t was the only place where he could really go without my dad messing with him." McNeese testified that applicant learned to swim at Hester House, became very good at swimming and enjoyed it, entered into swimming competitions, and at age thirteen, won an award for saving a deaf and mute boy from drowning.

Paravena Richardson, applicant's cousin, testified that she spent a lot of time in the Moore household as a child and attended school with applicant and some of his siblings. Richardson stated that they first attended Atherton Elementary but then were bussed to Scroggins Elementary, at which the student body was primarily Hispanic. Richardson stated that she was in the same classes with applicant at Scroggins and that the Hispanic students there treated him badly—calling him names, picking fights, and once hitting applicant in the side of the face with a brick. Richardson testified that, as a result of his treatment by the Hispanic students, applicant was withdrawn in class and kept to himself.

Richardson said that she had seen Junior, who was quite controlling and could be set off by the most minute things, become physically violent with his children. Richardson stated that Junior targeted applicant more than the other boys. Richardson did not know why and noted that Junior and applicant's older brother, Charles, had almost as poor a relationship.

Applicant's brother, Lonnie Moore, testified that he was a couple of years younger than applicant. When Lonnie was ten years old, he attended Scroggins Elementary with applicant. Lonnie testified that he and applicant were part of a group of students who were bussed to Scroggins to integrate it. Lonnie was aware at the time of racial tensions at Scroggins and of things that happened to applicant there.

Lonnie stated that his parents treated him and his younger siblings differently than they treated the older children. Unlike the older children, Lonnie and his younger siblings had to stay in the backyard. They were not allowed to play out in the streets with friends and would be watched over by their eldest sibling, Clara Jean. Lonnie testified that applicant and his other older brothers were not subject to the same restrictions. Lonnie saw Junior physically abuse applicant when applicant stood up for what he thought was right, which included protecting their mother from Junior's abuse. Lonnie testified that, due to the tension between applicant and Junior, applicant was not comfortable or able to relax at home.

Lonnie testified about gifts that applicant had made in prison for him, which included: clocks in the design of a church and a church cross, a jewelry box, and

picture frames.[23] Lonnie further testified that he had seen a big change in applicant since applicant had been on death row. Lonnie thought that applicant had gained direction and developed compassion, and noted that they now talked a lot about religion.

Applicant's brother, Johnny B. Moore, testified that he was four years younger than applicant. Johnny saw Junior hurt applicant, sometimes for no apparent reason, and at other times, because applicant was trying to stop their parents from fighting. When applicant was still living in the family home, applicant earned money by cutting grass. When the children did not have enough to eat, applicant would use his earnings to help feed his siblings.

Ronnie Moore, the youngest of applicant's brothers, testified that when their parents were gone, the older children—primarily applicant, Clara Jean, and McNeese—took care of the younger children. Ronnie stated that there was often no food in the house. On one occasion when applicant and McNeese were in charge of the younger children and there was no food, Ronnie saw applicant and McNeese eating from the neighbors' trash cans. He recalled that they contracted food poisoning.

Ronnie further testified that applicant worked on the weekends for a man named Collier, who mowed lawns, and that applicant also worked in a rest home. Ronnie testified that applicant used his earnings to help support the family. Applicant gave Ronnie money for lunch and their mother money for bills. Ronnie testified that, in addition to beating applicant, Junior would call applicant "stupid" and "dummy."

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[23] Photographs of these items were admitted into evidence.

Cloteal Morris, applicant's mother's cousin, testified that applicant was quiet and well behaved as a young boy, but he was not an open child and never talked very much. She stated that applicant had written her beautiful letters from prison about church and religion. Alice Moore, applicant's maternal aunt, testified that applicant was quiet as a child and "seemed like a regular kid." She stated that applicant wrote letters to her from prison and described them as "just normal letters."

The defense also called Jo Ann Cross, a London solicitor. Cross became acquainted with applicant through her mother, who began corresponding with applicant in 1990. Cross began corresponding with applicant in 1993. Cross testified that applicant's writing style, spelling, grammar, and use of language had all improved during the period of their correspondence and that it continued to improve.

Cross further stated that applicant now showed "a greater deal of understanding of all sort of issues, be it culture issues [or] politics" than he had at the beginning of the correspondence. Cross explained that she had arranged for applicant to receive newspapers and articles and that they had discussed these materials in their correspondence. She testified that applicant had "absolutely" demonstrated an ability to understand and comprehend the events that she was discussing with him and that he had shown sympathy and happiness for her when it was appropriate. After her mother died in 1996, applicant wrote Cross a very moving letter about her mother's death. Applicant had also made and sent gifts for Cross and her mother, including a jewelry box with a prayer for peace inlaid in the lid and a musical jewelry box.

TDCJ guards testified that, while on death row, applicant obtained the status of a staff-support inmate, which allowed him to apply for jobs within the prison and enjoy certain privileges during his non-working time. Applicant's records showed that he successfully applied for jobs as a wing porter and barber and that he also worked in the shoe and garment factories.

A Harris County Jail guard, Jeff Dixie, testified that, while applicant had been in jail awaiting the retrial, he had seen applicant reading a newspaper. Another Harris County jailor, Kenneth Wayne Young, testified that he had written a motivational book, "Wakeup Call," and that the chaplain had given a copy to applicant. Young testified that applicant read "all the time" and that applicant introduced newly arrived or troubled jail inmates to Young's book.

The defense also called two expert witnesses to testify, Dee Dee Halpin and Bettina Wright. Halpin was an educational diagnostician with a master's degree in special education. Wright was a clinical social worker who held a bachelor's degree in psychology and a master's degree in social work.

Halpin stated that, at the defense's request, she reviewed applicant's educational records. These records reflected applicant's attendance, conduct and academic grades, academic achievement test scores, and IQ test results.[24] Halpin testified that applicant attended Atherton Elementary School from kindergarten through fourth grade. She stated that there was a recommendation during the kindergarten year that

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[24] Halpin prepared a written summary of applicant's educational records, which was admitted into evidence at the punishment retrial.

applicant receive psychological testing because he was very withdrawn. Although the person who recommended testing commented that intellectual-disability was a possible cause for applicant's presentation, that person thought that emotional problems were the more likely explanation.

Halpin testified that applicant was promoted to first grade, but he made very poor grades that year, especially in all of the language areas, he tested "poorly" in reading and math readiness, and his eye-hand coordination was immature.[25] When applicant was retained a year in first grade, his grades remained weak, with the only significant change being that his conduct grade dropped from "good" to "needs improvement." When applicant was socially promoted to second grade at age eight, his grades remained about the same. Applicant attended summer school and was promoted to third grade, where his poor grades continued and his conduct dropped to "unsatisfactory," the lowest possible conduct grade. Halpin testified that applicant's score that year on the Iowa Test of Basic Skills (ITBS), a group-administered standardized achievement test, indicated that he was a third grader performing at a second-grade level.

Halpin testified that applicant was promoted to fourth grade, but his grades remained poor, and he continued to perform below grade level on the ITBS. He was promoted "on appeal" to fifth grade and began attending a new school, Scroggins Elementary. Applicant's grades improved from Fs to Ds, and his conduct grades for that year showed significant

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[25] Halpin's written summary indicated that applicant took a Metropolitan Readiness Test (MRT) and a Goodenough Draw-a-Man test in first grade, obtaining a "low normal" result on the MRT and an "immature" result on the Goodenough.

improvement. When he took the ITBS that year, applicant's math score was within the average range, although his language score remained below average. When noting applicant's result on the OLMAT that applicant took that year (77 IQ), Halpin described the OLMAT as a group-administered IQ test.

Halpin stated that applicant attended a third elementary school for sixth grade. She testified that attending three different schools within three years would be difficult for any child. Halpin explained that, in the era in which applicant attended school, the grade in which certain skills were taught often varied between schools. As a result, a student who changed schools frequently in that era might miss being taught certain skills. In addition, changing schools disrupted continuity in a child's learning and required the student to make a social adjustment to the new environment.

Halpin stated that applicant's ITBS scores for sixth grade showed him to be performing two years below grade level. Applicant's records also showed that he took a Slosson Intelligence Test that year, at age thirteen.[26] Halpin testified that applicant "came out with a mental age of seven-and-a half and so his IQ was 57," which fell within the intellectually disabled range. But Halpin noted that the Slosson is an individually administered IQ test that strongly favors verbal skills. She asserted that a student with any kind of language difficulty would typically perform poorly on the Slosson and that applicant had consistently shown such language difficulties. In addition, Halpin testified that a notation in applicant's records

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[26] The records that applicant submitted with his 1992 writ application did not mention a Slosson Intelligence Test.

stated that his Slosson IQ score of 57 was "minimal." Halpin explained that a "minimal" notation typically meant that the test administrator felt that the person actually functioned at a higher level.

Halpin was additionally skeptical of applicant's score on the Slosson because he subsequently took the individually administered WISC, which separately assessed verbal and nonverbal abilities. Within the overall IQ score of 78 that applicant obtained on the WISC, he obtained a verbal IQ score of 77 and a nonverbal or performance IQ score of 83. Halpin testified that, according to his school records, applicant remained in a regular classroom following the WISC testing.

Halpin testified that she had also reviewed a letter that applicant had recently written. She stated that, although the letter contained some errors, the language was "certainly coherent," "fairly complex," and "adult[-]like." Based on all the materials she reviewed, Halpin opined that applicant functioned in the low-average range of intellectual functioning and that he "definitely had some ability to learn that wasn't tapped early in his school years."

Wright testified that she had reviewed applicant's educational records and Dr. Borda's 1993 evidentiary hearing testimony. She also interviewed applicant twice, for a total of four hours. Wright concluded that applicant "was nowhere near retarded." She opined that applicant had an average IQ and that his ability to learn was "very intact."

Wright attributed applicant's difficulties in school to undiagnosed learning disabilities and emotional problems. She opined that his emotional problems stemmed from his learning disabilities, academic

failure, and self-described "scary" childhood. She concluded that the quietness and constrained movement noted in applicant's records were due to his fear rather than to any diminished intellectual functioning. She explained that applicant was a very vigilant and watchful child who carefully assessed situations before acting.

Wright testified that applicant's drug use exacerbated his difficulties in school. Applicant told Wright that he began to use drugs in fifth grade to "escape the pain." He began by using marijuana. By the time he was of junior-high and high-school age, Wright testified, applicant was using marijuana, alcohol, amphetamines, tranquilizers, and whatever else he could obtain.

In closing argument, defense counsel emphasized applicant's background. Defense counsel asserted that applicant did so poorly in school that he "was considered to be possibly [intellectually disabled]." But counsel asserted that "we learned later from the experts and other people who looked at [applicant's school records] that he wasn't really [intellectually disabled] at all, he was capable of learning." Counsel argued that "mostly what [applicant's] young life was about" was "lack of food, violence in the home[,] and one failure after another in school. . . . It was a cycle of violence in which there was no peace and no safety in the home." Counsel asserted that, in addition to physically abusing applicant, Junior Moore emotionally abused applicant by conveying the idea that he "wasn't any good, he wasn't smart, [and] he couldn't learn." Counsel argued that applicant "[was] not retarded, he was just treated like somebody that was retarded" and that it was not until applicant "[went] to prison[,] away from his family environment that [he

was] actually safe enough to be able to learn and grow and become the kind of person that he could have become had he come from a safe environment."

The trial court charged the jury pursuant to Article 37.0711. On February 14, 2001, in accordance with the jury's answers to the special issues, the trial court again sentenced applicant to death.

E. Direct Appeal from 2001 Punishment Retrial

Robert Morrow, applicant's punishment-retrial counsel, also represented applicant on the automatic direct appeal to this Court. *See* Art. 37.0711, § 3(g). On August 20, 2002, Morrow filed a brief on applicant's behalf. On the same date, he filed "Appellant's Motion To Stay Proceedings Under [*Atkins*] Pending Legislative Action, As An Alternative To Relief Requested In Appellant's Brief." Despite having argued at the punishment retrial that applicant was not intellectually disabled and having presented the testimony of two experts to support that theory, Morrow now asserted that applicant "ha[d] a strong claim of [intellectual-disability]" under the June 2002 Supreme Court opinion in *Atkins*. Morrow urged us to stay applicant's direct appeal until the Texas Legislature enacted legislation to implement *Atkins*'s mandate. We denied the motion on September 11, 2002.

On October 3, 2002, applicant filed a *pro se* "Motion for Leave to File Appellant's [*Pro Se*] Supplemental Brief." In the motion, applicant acknowledged that he was not entitled to hybrid representation, but stated that he wished to file a supplemental *pro se* brief to raise an additional point of error. In his *pro se* supplemental brief, applicant argued that Article 37.0711 was unconstitutional because it implicitly

placed the burden on the defendant to show that sufficient mitigating factors exist to warrant a life sentence rather than death. We denied applicant's motion on October 4, 2002, and later affirmed his sentence. *See Moore v. State*, No. AP-74,059, slip op. at *2 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 43 U.S. 931 (2004).

II. Current Habeas Proceedings

A. Applicant's Application and Supporting Exhibits

On June 17, 2003, through appointed habeas counsel Stephen Morris, applicant filed his current application pursuant to Article 11.071. In support of his request for an evidentiary hearing on his *Atkins* claim, applicant attached affidavits executed in 2003 by Gina Vitale, a social worker and his mitigation investigator, and Dr. Richard Garnett, a clinical psychologist. Vitale and Garnett each asserted that there was sufficient evidence of applicant's intellectual-disability, as defined in the tenth (2002) edition of the AAMR Manual or the DSM-IV, or both, to warrant an evidentiary hearing.[27] According to their affidavits, although Vitale interviewed applicant's relatives, neither Vitale nor Garnett personally assessed applicant. Instead, they based their opinions on their review of Vitale's interviews with applicant's family; affidavits and interview notes compiled by applicant's previous defense team; and some of applicant's records. Neither Vitale nor Garnett actually diagnosed applicant as intellectually disabled.

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[27] The definitions of intellectual-disability contained in the tenth edition of the AAIDD Manual and the DSM-IV do not require that an individual's adaptive behavior deficits be linked or "related" to deficiencies in intellectual functioning. *See* INTELLECTUAL-DISABILITY 8; DSM-IV 37.

Vitale discounted applicant's 77 IQ score on the OLMAT, describing that instrument as a state-mandated, group-administered IQ screening tool, and she emphasized the 57 IQ score that he obtained on the Slosson. Vitale acknowledged applicant's WISC score (78 IQ), but asserted that his mental age scores on the concurrently administered Bender Gestalt and Goodenough tests reflected much lower IQ scores of 67 and 71, respectively.[28]

Garnett stated that the OLMAT is a group test that requires one to read. Due to evidence of applicant's inability to read, Garnett questioned the validity of applicant's OLMAT score. Garnett also asserted that applicant obtained a 67 IQ score on the Bender Gestalt and a 72 IQ score on the Goodenough test that he took in conjunction with the 1973 WISC.

B. Applicant's *Pro Se* Requests to Waive Further Appeals

The State filed an original answer in December 2003, followed by a supplemental answer in January 2004. On June 23, 2005, direct appeal counsel Morrow wrote to the current habeas judge, stating:

> It is my understanding that you recently received a request from [applicant] to discontinue his appeals and or [sic] pending writs. I received the same request. However, immediately after that, I received instruction from [applicant] that he no longer wishes to withdraw his writs or appeals. [Applicant] is dealing with the stress of Death Row and was

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[28] According to her affidavit, Vitale arrived at these IQ scores for the Bender Gestalt and Goodenough tests by comparing applicant's mental-age score on those instruments against his chronological age at the time of testing.

> understandably upset when he wrote the first letter. [Applicant] wants to continue his post conviction efforts.

Despite Morrow's assertions, on October 3, 2005, applicant filed a "*Pro Se* Ex Parte Motion to Waive Further Appeal" in the trial court. Applicant correctly stated that he had been sentenced to death on February 14, 2001, after a new punishment trial; that the trial court had subsequently appointed Morrow to represent him on direct appeal; and that it had appointed Morris to prepare a postconviction application for a writ of habeas corpus. Applicant moved the trial court to dismiss Morrow and Morris, to find that he waived further appeals of his capital-murder conviction and death sentence, and to set his execution date.

On May 30, 2006, the current habeas judge held a hearing concerning applicant's *pro se* motion. Direct-appeal counsel Morrow appeared on behalf of applicant, who, by the parties' agreement, was not present. The court stated that, in response to applicant's 2005 letter and motion, it had ordered him moved from death row to the Harris County Jail for a psychological examination to determine his competency to withdraw his application. The court further stated that, as of the 2006 hearing date, applicant had been at the jail for sixty-nine days but had refused to speak with doctors. Therefore, the court said, no psychological examination could be completed. Counsel for both parties agreed to the court's factual recitation. Because no psychological examination could be completed, the court ordered applicant's habeas proceeding to continue, directed that he be returned to death row, and instructed Morrow to write

to applicant to explain why the court could not proceed with the *pro se* motion.

C. Applicant's Supplemental Filings in Support of His *Atkins* Claim

In 2009, current writ counsel, Pat McCann, substituted for Morris, who was permitted to withdraw. In late 2011, McCann filed a lengthy "Factual Supplement" in support of applicant's *Atkins* allegation. The Factual Supplement included documents that appeared to be notes taken by applicant's 1992 writ and 2001 punishment-retrial defense-team members, specifically, Kristi Franklin Hyatt, Anthony S. Haughton, Patrick Moran, and Jemma Levinson. The notes memorialized their interviews with applicant, various relatives, and Dr. Borda.

According to those notes, on November 14, 1991, applicant told Haughton that Junior Moore physically terrorized and abused applicant's mother and siblings just as badly as he did applicant; applicant was a slow learner who did not do well in school; and due to family moves and racial integration efforts, he attended several different schools. Applicant said that, when he dropped out of school around age fifteen or sixteen, he could barely read and started living "a street life." He had his first drink at age thirteen, and before going to prison at age seventeen, he regularly abused alcohol and drugs. In junior-high school, he started smoking marijuana and taking 7 to 14 Quaalude pills per day, and he tried methamphetamine. Applicant also reported that, after his first stint in prison, he started cooking and injecting "preludes."[29] Applicant stated

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[29] We understand "preludes" to refer to phenmetrazine. *See United States v. Green*, 246 F.3d 433, 434 (5th Cir. 2001).

that he got stoned regularly, often combining preludes, marijuana, and alcohol.

According to the notes, in April 1993 (i.e., before the 1993 evidentiary hearing), Borda told Hyatt that he did not consider applicant intellectually disabled, although he believed that physical abuse, neglect, and substance abuse may have affected applicant's mental status at the time of the offense. Because applicant had never been tested for a personality disorder, Borda told Hyatt that he could not rule out schizophrenia or personality disorders. However, Borda said that he felt comfortable describing applicant as having at least below average intelligence, a learning disorder, and compromised social development. Borda believed that applicant had some sort of brain dysfunction, possibly from a frontal-lobe injury, which would result in a lack of impulse control and a diminished ability to think through the consequences of his actions. But Borda acknowledged to Hyatt that amphetamine abuse could cause "this personality defect."

The notes in applicant's Factual Supplement indicated that defense-team members interviewed applicant four times in 2000. Moran interviewed applicant in February and March of that year. During the interviews, applicant stated that his mother, Marion, would send him to look for Junior, who was often absent. Applicant would usually find Junior drunk and with another woman. Applicant observed that it probably angered Junior for applicant to find him in such a compromising position and that Junior may have beaten applicant harder than the other children to deter him from telling Marion.

Applicant stated that, after being permanently thrown out of the house, he could have stayed with

nearby friends. But because applicant felt ashamed, he instead spent the first night in a neighbor's garage.

Applicant said that his earlier period of incarceration would show two disciplinary matters. One was for making gambling dice from paper and soap. The other was for fighting a bullying inmate named "Cadillac." Applicant recalled that he had been in the day room talking to an inmate who was known as an easy rape victim. When Cadillac began taunting both of them, a fight ensued. Applicant said that a guard who witnessed the incident corroborated his assertion of self-defense.

Jemma Levinson interviewed applicant twice in May 2000. According to her notes, applicant stated that he looked after his older brother, Charles, who sometimes got into trouble when drinking, and that he broke up fights between Charles and their brother Jessie. Applicant also said that it fell to him and his sister, Clara Jean, to look after the younger siblings. At school, applicant's sister, Colleen, told him that a boy was bothering her.[30] Applicant told the boy to leave Colleen alone and fought with him.

Applicant described himself to Levinson as the kid in the neighborhood that everyone liked and recalled that he would clean houses and cut yards. Applicant told Levinson that, when he was around eleven or twelve years old, he would sneak out of the house between 1:00 and 2:00 a.m. to see friends. Applicant said that he lacked guidance and became attracted to "things on the street."

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[30] This is the same Colleen McNeese who testified at the 1993 evidentiary hearing and the 2001 punishment

Applicant also stated that he did not do well in school, did not like it, and was frustrated by his inability to read or write. To escape class, at first he would go to the school nurse, pretending to be sick. He started skipping school in fourth grade, skipped school a few times in sixth grade, and by seventh grade, almost entirely stopped going. Applicant told Levinson that he also started drinking in the seventh grade.

Applicant reported that, in seventh grade, he wanted to be a football or baseball player and tried out for school sports teams, but he had to stop playing when he ran over a wire hanger while mowing lawns and suffered a cut to his leg. The hospital put a cast on his leg, which he ultimately removed himself because he was determined to walk on his leg. Applicant said that he met his first girlfriend at school and that he would sneak from his house at night to see her. Applicant stated that he got into trouble at school for fighting and had a reputation for it, such that people wanted to fight with him. Applicant thought that the fights came about because he was shy and did not know how to communicate.

Applicant also told Levinson that he began hanging around the pool hall, where he learned to gamble and steal. Another guy around his same age showed him how to shoot pool, rob people, steal cars, and break into houses. Applicant told Levinson that he later began doing those things on his own.

Applicant further stated that he started injecting preludes when he was between fifteen and sixteen years old, but he later stopped because it scared him, and he knew that he would end up dead or doing something that he would regret. Applicant also stopped drinking alcohol after seeing the effect it had on him, but he continued smoking marijuana.

Applicant reported that he paid for drugs with money that he made from stealing and selling cars, breaking into houses, and hustling pool.

Applicant also told Levinson that during his earlier period of incarceration, he made friends with an inmate named Swan. Applicant and Swan would stay out of the day room to avoid the fights that frequently occurred there. Instead, he and Swan would play dominoes elsewhere and applicant had a disciplinary report for one of those occasions. Applicant recalled that, around 1997, he went through "a bad period" on death row, during which all he did was sleep and gain weight. Applicant further told Levinson that he had ordered and read a book written by a jail officer.

The notes contained in applicant's Factual Supplement indicate that Moran and Levinson separately interviewed Clara Jean Baker in 2000. According to those notes, Clara Jean reported that both of applicant's parents regularly beat all of the children except for her. Clara Jean recalled that, as applicant grew older, he would intervene when his parents fought, causing Junior to throw him out. Clara Jean said that applicant knew about Junior's many extramarital affairs and that Junior was always angry with applicant for catching him in infidelity. Clara Jean further stated that applicant and their brother, Jessie, would sneak out of the house. In his early years, applicant was quiet, shy, and did not spend much time with other people, but otherwise was happy, artistic, and always working. In summer, applicant would cut yards all day until Marion came home. Applicant liked wearing nice things and cared a lot about his appearance. Clara Jean recalled that applicant had a girlfriend at school named Robin, who

was "very cute," and other boys envied him because of it.

The notes also indicate that Levinson interviewed Larry Baker in 2000. Larry reported that, as a child, applicant was "personable and impressionable, . . . a very good athlete," liked animals, was obedient, attended school, and "was just the same as the rest of us." Applicant trained the Moore family's dog and put on "shows" with the animal. The dog was very well trained and did whatever applicant said. Larry recalled that applicant followed clothing trends, was pleasant and well-mannered, and was always helpful, doing odd jobs and selling newspapers. He described applicant as enterprising and having a lot of friends. As they grew older, Larry started noticing changes in applicant's choice of associates and in applicant's attitude towards attaining things. Larry stated that applicant developed the attitude that he did not want to work his whole life and have nothing. Larry told Levinson that applicant always looked neat and tidy, had good hygiene, and worked in a fish market and cut grass to buy his clothes.

D. Appointment of Mental-health Experts

The current habeas court appointed mental-health experts for both parties in anticipation of the 2014 evidentiary hearing. Dr. Borda again assisted applicant, as did Dr. Shawanda Williams Anderson, a clinical neuro-psychologist, and Dr. Stephen Greenspan, a retired professor of educational psychology. Dr. Kristi Compton, a clinical and forensic psychologist, assisted the State. Before the hearing, habeas counsel filed

Borda's affidavit and Anderson's "Forensic Neuropsychological Report."[31]

According to her report, on November 22, 2013, and December 6, 2013, over a period of four hours, Anderson conducted an initial diagnostic interview of applicant at TDCJ's Polunsky Unit and administered various neuropsychological tests to him. She thereafter interviewed applicant's family members for approximately two hours. On December 19, 2013, Anderson administered math subtests of the WAIS-IV and Wide Range Achievement Test-4 (WRAT-4) to applicant at the Harris County Jail, solely to determine his computational ability.

According to Borda's affidavit, he administered "a very limited test battery" to applicant on December 12, 2013. That battery consisted of three neuropsychological tests and one formal measure of IQ, a Raven's Colored Progressive Matrices (RCPM) test. Applicant obtained an IQ score of 85 on the RCPM.

On January 1, 2014, Compton conducted a six-hour assessment of applicant. After interviewing applicant about his personal history, she administered a Test of Memory Malingering (TOMM); a WAIS–IV; a Wechsler Memory Scales, 4th Edition; a complete WRAT-4; and a Texas Functional Living Scales, a test of adaptive functioning. Applicant obtained a full scale IQ score of 59 on the WAIS-IV.

E. January 2014 Evidentiary Hearing

Lonnie Moore, Colleen McNeese, Larry Baker, Mark Fronkiewicz, Borda, Greenspan, and Anderson testified for applicant at the 2014 evidentiary hearing.

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[31] Although habeas counsel described Anderson's report as a sworn affidavit, the report is not sworn or notarized.

Through applicant's relatives, applicant again presented evidence of Junior's alcoholism and physical abuse, the family's limited financial means, and applicant's poor grades and reading difficulties.

Lonnie Moore testified that applicant was shy, quiet, and athletically talented as a child, especially at swimming, but he received poor grades in school and never read well. While still living with the family, applicant made money in the summer by cutting grass and helping a man with household projects. After being thrown out of the house, applicant worked at the Galleria for a place that sold sausages.

Lonnie and McNeese testified that their mother, Marion, cooked the family's meals on a hot plate and that the family did not have kitchen appliances such as a microwave oven. McNeese asserted that applicant did not know how to cook and did not help prepare food. However, McNeese and Lonnie both testified that only the female children were enlisted to help Marion with meal preparation.

McNeese had testified at applicant's 1993 evidentiary hearing and his 2001 punishment retrial. She now remembered that the incident on the school bus, in which applicant was hit in the head with a brick, was a much more violent event than she had described in her prior testimony, asserting that it involved the bus being set on fire with Malotov-cocktail-like devices. McNeese also now remembered that, when applicant was in second and third grade, he could not tell a $1 bill from a $5 or $10 bill, was not allowed to go places by himself because he did not know how much change he was supposed to receive, and that she had to accompany him and handle the money. But McNeese acknowledged that, after he learned to read, applicant was able to distinguish the

denominations on bills. McNeese also acknowledged that she had recently received letters from applicant and that his counting, reading, and writing ability had greatly improved since his imprisonment.

Through McNeese, habeas counsel attempted to show that Junior treated applicant more harshly than his siblings and that he did so because he perceived applicant to be intellectually disabled. Habeas counsel elicited testimony from McNeese that Junior was more cruel to applicant than to her other siblings. McNeese stated that Junior would call applicant "dumb," bend applicant's hand back, and whip him when applicant could not spell words or read on command. McNeese stated that Junior would get especially angry when school representatives visited the house to say that applicant needed help. McNeese testified that she was present when Junior "ran off" two such representatives, one of whom suggested that applicant was intellectually disabled and needed a different educational setting. But McNeese stated that, at the time, she did not think that applicant was intellectually disabled. She also testified that, while applicant was "left behind" in school, he was always in regular classrooms. In contrast to her 2001 testimony that applicant functioned better and participated more when he was at places like Hester House, where Junior "could[n't] . . . [mess] with him," McNeese now asserted that applicant functioned the same whether Junior was present or absent.

Contrary to his earlier statements, Larry Baker now remembered that applicant was the slowest kid in a group of neighborhood boys who played sports together and that the other boys teased applicant for being a "dummy" until Larry made them stop. Larry testified that, when they played football, applicant

could not follow verbal play instructions very well and that Larry had to diagram plays in the dirt for him. When they played baseball, he had to repeatedly tell applicant not to sling the bat. Larry also now remembered that people tried to take advantage of applicant, although he recalled that applicant would stand up for himself. Although Larry did not dispute his 2001 testimony concerning the advances applicant had made while in prison, he asserted that applicant's letters did not reflect a mature, thoughtful person with a normal state of mind.

Through the testimony of Mark Fronkiewicz, who acknowledged that he had an extensive criminal record and was on parole for murder at the time of the hearing, habeas counsel attempted to minimize the evidence of applicant's many *pro se* filings and other writings included in the record. Fronkiewicz testified that he spent 1988 to 1993 on death row, before inmates received appointed counsel, and he worked as a writ writer, assisting inmates with legal and personal correspondence and writ preparation. Fronkiewicz stated that he recognized applicant from death row, but had never talked to him. Fronkiewicz asserted that David Harris was another writ writer on death row when Fronkiewicz was there. Fronkiewicz said that Harris sought his assistance on a *pro se* writ that Harris was preparing for applicant. Fronkiewicz remembered discussing applicant's case with Harris, but could not recall the date.

Borda, who acknowledged in his 2013 affidavit that forensic psychology "is not [his] specialty," testified that he now concluded that applicant met the criteria for a intellectual-disability diagnosis.[32] In forming his

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[32] In his 2013 affidavit, Borda acknowledged that, in 1993, he concluded that applicant's intellectual functioning fell within the

current opinion, Borda relied on: the records he reviewed in preparation for his 1993 evidentiary-hearing testimony; unspecified other medical records and affidavits provided by current writ counsel; unspecified other records, provided by unspecified other sources; "some family history"; Vitale's and Garnett's affidavits; Anderson's written report; the 2014 evidentiary hearing testimony of applicant's relatives; and his own "really . . . very, very brief" assessment of applicant in December 2013, which did not involve giving applicant "a [full scale] IQ test." Borda acknowledged that he did not know much about the offense and had not read applicant's confession or trial testimony. Borda asserted that Vitale, Garnett, and Anderson had also diagnosed applicant as intellectually disabled.

Greenspan testified that he had a practice related to diagnosing intellectual disability in the forensic setting and that he performed the vast majority of his work for defense attorneys. In the roughly fourteen years since the *Atkins* decision, he had actually performed 10 to 12 clinical evaluations for intellectual disability and diagnosed intellectual disability in about two-thirds of them. Greenspan further testified that his clinical evaluations are not comprehensive because he focuses on the adaptive-deficits criterion. Greenspan stated that he taught IQ courses many years ago, but when working in his clinical capacity, at most, he only occasionally administers an IQ

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borderline range (an IQ of 70–79). But Borda asserted that he had since reviewed "extensive additional records." Borda also stated that the Flynn Effect was now widely accepted in the field of psychology and that the definition of intellectual disability had changed. Borda stated that these developments also contributed to his present opinion. *Id.*

screening test. When determining whether a defendant satisfies the sub-average intellectual-functioning criterion, Greenspan relies on IQ test scores in the defendant's records. If none exist, then he requests that someone who is "more current" with IQ testing conduct such testing.[33]

Greenspan stated that he was testifying in applicant's case as a teaching expert and acknowledged never having met or communicated with applicant. Greenspan also acknowledged that he had not read the transcript of either of applicant's two trials. Although Greenspan did not offer a diagnosis, he testified that he had no reason to doubt Borda's intellectual-disability diagnosis and saw no basis for any other diagnosis.[34]

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[33] Greenspan acknowledged that, about a year before applicant's hearing, a federal judge issued an opinion in the Alexis Candelario Santana case, warning courts across the country to be cautious when reviewing Greenspan's testimony in future intellectual-disability cases. *See United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 203–06 (D.P.R. 2013) (finding Greenspan to be "completely lacking in credibility" and stating that due to "bias[]," "considerable careless errors and slipshod disregard for the seriousness of the [court's] inquiry," continued "combative[ness] and evasive[ness] despite being admonished to be more forthcoming with his answers," "unwilling[ness] or [inability] to explain evidence that tended to refute his conclusions[,] and . . little explanation . . as to why he thought the government's experts' assessments were incorrect," Greenspan's testimony in an *Atkins* evidentiary hearing "suffered from extreme deficits" such that it "was fundamentally unreliable" and should be disregarded).

[34] Applicant elicited no testimony concerning precisely what records Greenspan reviewed in preparation for his testimony. In response to State questioning, Greenspan mentioned that he had been given roughly 200 pages consisting of "all the different pleadings." Greenspan, however, acknowledged that he did not

Anderson testified that current writ counsel originally asked her to determine whether applicant was born with a brain anomaly ("organicity") or evidenced a traumatic brain injury (TBI). To make those two determinations, Anderson reviewed unspecified school and medical records that current writ counsel provided, conducted an initial diagnostic interview, and administered various neuropsychological tests. Anderson testified that the neuropsychological tests she gave were not IQ tests.

Anderson stated that applicant's scores on the tests she gave indicated language deficits, slowed processing speed (but an intact memory), and problems with reasoning and judgment. Anderson testified that applicant's verbal memory score fell in the low-average range, reflected a weakness in his ability to acquire words (versus the ability to recall them once learned), and implicated his capacity to learn. She stated that applicant's scores on the executive-functioning assessments she gave were all in the "severe" range.[35]

Anderson testified that, after she conveyed her findings on organicity and TBI to current writ counsel, he asked her to review the criteria for intellectual disability.[36] Anderson testified that she has made intellectual-disability determinations at least a few

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review State's Exhibits 1–35, which were admitted into evidence before the beginning of Borda's testimony.

[35] Notably, Anderson stated in her report that applicant "reported that he used reading glasses for corrected vision, but did not have them at the time of testing. However, he reported being able to see all test stimuli accurately and without incident."

[36] At the hearing, Anderson did not state what conclusions she drew, if any, concerning whether applicant was born with a brain anomaly or suffered a TBI.

times in her practice. Anderson stated that, in making her intellectual-disability determination, she did not conduct any further evaluation except for a two-hour group interview of applicant's relatives. Anderson opined that applicant would meet the DSM-IV's and AAIDD's criteria for intellectual disability. [37]

Jerry LeBlanc and Compton testified for the State at the 2014 evidentiary hearing. LeBlanc testified that he had worked at the Polunsky Unit's commissary for fourteen years and and personally dealt with the commissary on a daily basis. LeBlanc explained the procedure by which death-row inmates request commissary items, described the kind of mathematical computations required to successfully complete a commissary form, and described his interactions with applicant regarding commissary transactions. \

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[37] In her report, Anderson stated:

> It seems [applicant] exhibited developmental and intellectual delays early in his life that were significant enough for him to require consistent monitoring and elicit help from his teachers. These deficits were demonstrated much prior to age 18, which would satisfy criteria for a formal diagnosis of [intellectual disability]. Adaptively, he had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition. . .
>
> Taking into account the records reviewed, prior intelligence test findings, and [applicant's] performance on more stratified and task-specific neuropsychological tests, he more likely than not meets full criteria for [intellectual disability]; and this clinician would be justified in assigning said diagnosis.

While looking at applicant's commissary records, LeBlanc testified to specific, recent examples of applicant having correctly computed multiple-unit order totals and having composed orders that came within 5¢ of the $85 limit. In one example, applicant used his funds to purchase fifteen postage stamps. LeBlanc also noted two examples of applicant having requested substitute items (one being a request for aspirin or dental floss in place of ibuprofen). LeBlanc testified that he did not help applicant complete commissary forms, and to his knowledge, no one else did. LeBlanc asserted that the commissary's price list changed frequently and that, although there was another cell adjacent to applicant's, the unit moved death-row inmates frequently, and thus, applicant did not have the same neighbor for significant periods.

LeBlanc additionally testified about his interactions with applicant regarding commissary transactions. LeBlanc stated that he and applicant had discussed what the commissary carried and whether it had correctly filled applicant's order. When the commissary had charged applicant for undelivered or damaged items, applicant had noticed, brought it to LeBlanc's attention, and been able to discuss the discrepancy or damage. LeBlanc had never received the impression that applicant was unable to understand what was going on with his commissary order or that he was unable to respond to LeBlanc's questions.

Compton stated that she had testified as an expert over seventy times and had conducted over 3,000 forensic evaluations, with about 50% of her work having been directly for the courts, 40% for defense attorneys, and 10% for the State. In preparation for her testimony, Compton reviewed applicant's school

records; past psychological testing results; TDCJ records (including commissary and disciplinary records); transcripts from applicant's 1980 trial (including applicant's testimony), 1983 *Faretta* hearing, and 2001 punishment retrial (including Halpin and Wright's expert testimony); letters from applicant to his attorney and others; motions filed by applicant; and recent photographs of items inside applicant's cell. Compton also personally assessed applicant by interviewing him and administering standardized tests, including effort tests. Compton additionally attended the entire evidentiary hearing and listened to the other witnesses' testimony.

Compton testified that the data she reviewed did not support an intellectual-disability diagnosis. Based on applicant's Flynn-Effect-adjusted scores on IQ tests that she considered valid, Compton concluded that there was a greater probability than not that applicant's intellectual functioning fell within the borderline range. But Compton noted that, when the standard error of measurement was applied to the mean of his valid, Flynn-Effect-adjusted IQ scores, the lower end of the scoring range could dip into the mild intellectual-disability range. Nevertheless, Compton opined that applicant's level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis.

After receiving the habeas court's findings of fact and conclusions of law recommending that we grant relief on applicant's *Atkins* claim, we filed and set the case to consider that allegation.

III. Analysis

To prevail on the allegation that he is intellectually disabled for Eighth Amendment purposes and,

therefore, exempt from execution, applicant must prove by a preponderance of the evidence that (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an IQ of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by significant and related limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen. *See Cathey*, 451 S.W.3d at 9; *Sosa*, 364 S.W.3d at 894; *Briseno*, 135 S.W.3d at 7.

A. Significantly Sub-average General Intellectual Functioning

Applicant has failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning. The IQ scores before us are: a 77 IQ score obtained by applicant in 1971 (age 12) on the OLMAT; a 57 IQ score obtained in 1972 (age 13) on the Slosson; a 78 IQ score obtained in 1973 (age 13) on the WISC; an estimated full scale IQ score of 71 obtained in 1984 (age 30) on an abbreviated WAIS-R; a 74 IQ score obtained in 1989 (age thirty) on a complete WAIS-R;[38] an 85 IQ score obtained in 2013

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[38] There appears to be an uncorrected scoring error associated with the 1989 WAIS-R. A raw score of 7 appears on the Digit Span subtest. Per the scoring table, the corresponding scaled score should be 4, but the test administrator wrote 5. At the 2014 evidentiary hearing, applicant offered no testimony about a scoring error or its effect on the reported IQ score of 74. In Addendum Finding 112, the habeas court noted the scoring error and stated, "The correction of this error means that the scaled score for Verbal Tests is now 32, rather than 33. With reference to the WAIS-R manual, the accurate full scale score should actually be one point lower, which equates to a [full scale] IQ score of 73."

There was no testimony at the 2014 evidentiary hearing about the WAIS-R manual, nor was the WAIS-R manual admitted into

(age 54) on the RCPM administered by Dr. Borda; and a 59 IQ score obtained in 2014 (age 54) on the WAIS-IV administered by Dr. Compton. Applicant also asks us to rely on the IQ scores that Borda and Garnett derived from the mental-age scores that he obtained in 1973 (age 13) on the Bender Gestalt and Goodenough tests administered by Marcelle Tucker.

At the 2014 evidentiary hearing, Borda identified the 57 IQ score on the Slosson as the first and most accurate assessment of applicant's IQ[39]. Borda reached that conclusion because, due to "practice effects in IQ testing, usually the most accurate assessment is the first test that's done."[40] He also cited applicant's lack of incentive to do poorly. Borda initially acknowledged that, like the RCPM, the Slosson is a group-administered test and not one that is widely used. On further redirect examination, Borda asserted that, like the RCPM, the Slosson could also be individually administered, but he acknowledged that the Slosson was not a test that he would use.

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evidence at the hearing or filed with the habeas court. Thus, the record does not support the habeas court's finding that applicant's WAIS-R score was actually 73 rather than 74. But even if we were to assume that applicant's WAIS-R score was actually 73, it does not change our determination that he has failed to prove significantly sub-average general intellectual functioning.

[39] In his affidavit, Borda acknowledged that applicant took the OLMAT in 1971, but asserted that the OLMAT is "a test used primarily to assess academic needs and is not accepted as an instrument appropriate for the assessment of [intellectual disability]."

[40] The AAIDD states that the "practice effect" refers "to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument." INTELLECTUAL DISABILITY 38.

Borda discounted applicant's 78 IQ score on the WISC. First, Borda asserted that applicant's WISC score should be adjusted to 70 for the Flynn Effect. Second, Borda noted that applicant contemporaneously took Bender Gestalt and Goodenough tests. Although he acknowledged that the Bender Gestalt and Goodenough tests are not IQ tests, Borda explained that he used applicant's mental-age scores on those instruments to derive IQ scores. Borda stated that he calculated an IQ score of 67 on the Bender Gestalt and an unspecified IQ score on the Goodenough. He then adjusted both derived scores for the Flynn Effect, arriving at a 56 IQ for the Bender Gestalt and a "mid-60s" IQ score for the Goodenough. Borda testified that the derived, Flynn-Effect-adjusted IQ scores on the Bender Gestalt and Goodenough tests indicated that the WISC score overstated applicant's level of intellectual functioning.

Borda also discounted applicant's 74 IQ score on the 1989 WAIS-R, asserting that it should be adjusted to 71 for the Flynn Effect. [41] Borda asserted that applicant's 85 IQ score on the RCPM could be artificially high due to the practice effect because the RCPM is very similar to the matrices portion of the Wechsler Scale IQ tests. But Borda acknowledged that, when he gave the RCPM, applicant had not been subjected to any meaningful IQ testing for over a decade. Borda also acknowledged that the AAIDD is the commonly accepted national authority on intellectual disability and that, per the AAIDD, the practice effect is nonexistent after seven years.

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[41] In response to a question that apparently referred to Compton's WAIS-IV testing, Borda acknowledged that applicant's IQ had been tested more recently, but stated that he had not reviewed those results.

Borda acknowledged that he did not conduct effort testing when he assessed applicant. Borda asserted that no good effort test exists for people with below-average IQs because most such tools gauge memory; therefore, people with memory problems will not score well on them. He also testified that effort tests are not normed for the below-average IQ population. Borda further asserted that, for a person with as much experience as he possessed, any malingering would be obvious from simple observation. But Borda denied taking the position in his testimony that effort testing is inapplicable to intellectually disabled people.

Borda agreed that applicant had a difficult childhood, describing it as "a horrible background" in which "a very authoritarian father" created "a very dependent" and "fearful" child. Although he acknowledged that applicant's childhood environment did not help his intellectual development, Borda asserted that applicant was "very limited" to begin with. Borda acknowledged that a learning disability is not the same as intellectual disability and that emotional disturbances (including depression) and environmental conditions (including living in an abusive household or having parents who are not intellectually curious) can adversely affect a person's learning ability and IQ scores. Borda also acknowledged that facing the death penalty could adversely affect motivation or cause depression and negatively affect test performance.

Borda acknowledged that others testified that applicant had done well and improved his academic skills while on death row. However, Borda did not find this testimony persuasive. Borda concluded that applicant was able to develop these skills on death row

because he had abundant time to practice very specific and essentially unchanging tasks.

Greenspan disregarded applicant's 77 IQ score on the OLMAT, asserting that the OLMAT is a group-administered test. He stated that group-administered tests are not comprehensive and do not yield a full-scale measure of intelligence. Greenspan also discounted applicant's 57 IQ score on the Slosson. Greenspan testified that, while the Slosson could be individually administered, it is a screening test that is not as comprehensive as the WISC and it is not considered a gold-standard test for diagnostic purposes. Greenspan also stated that the version of the Slosson test given to applicant derived IQ scores by the unreliable and now-abandoned ratio method that compared chronological and mental age. He testified that the Slosson is now scored using the more valid statistical-deviation method. Greenspan further indicated that the degree of statistical deviation from the mean is the currently accepted method of evaluating an individual's intellectual functioning.

Greenspan testified that the Wechsler scale is considered the gold standard. But Greenspan testified that applicant's 78 IQ score on the WISC should be reduced for the Flynn Effect to below 70, if applicant took the original WISC, or to between 70 and 71, if applicant took the WISC-R. Greenspan testified that, even without correcting for the Flynn Effect, the standard error of measurement (SEM) meant that applicant's WISC score could have been as low as 73. But Greenspan also volunteered that the score obtained on the WISC by someone who, like applicant, came from a poor, African-American family could underestimate the actual level of intellectual functioning.

Greenspan testified that the WAIS-IV is the current gold standard for IQ tests, and he emphasized that applicant obtained an IQ score of 59 on the WAIS-IV that Dr. Compton had recently administered. Although he had earlier testified that applicant's Slosson score was unreliable, Greenspan emphasized that applicant's WAIS-IV score was almost identical to applicant's Slosson score.[42]

On direct examination, Greenspan testified that the validity of effort tests for people in the intellectually disabled range had not been adequately established. Greenspan asserted that the two best indicators of effort for intellectually disabled people are (1) the clinical judgment of an experienced evaluator; and (2) whether current test results are congruent with past test results, especially on tests given when the subject had no incentive to do poorly. Based on the testimony given at the 2014 evidentiary hearing by applicant's relatives, Greenspan concluded that a lack of ability was a more likely explanation for applicant's poor test scores than a lack of good effort.

On cross-examination, however, Greenspan acknowledged that the recommended practice in forensic psychology is to conduct effort testing, especially when one is administering cognitive measures. Greenspan denied taking the position, on direct examination, that effort testing is less applicable to someone with intellectual disability. He clarified that the results of effort tests given to intellectually disabled people are more difficult to interpret, because of problems validating effort tests for low IQ individuals. Greenspan agreed that it is

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[42] Neither party elicited testimony from Greenspan regarding applicant's 85 IQ score on the RCPM given by Borda.

important to analyze the results of IQ testing to ensure validity, especially when an external motive to exaggerate symptoms might exist. Greenspan also agreed that, for many people, facing the death penalty would be a significant external motivating factor. Greenspan volunteered that "there are all kinds of reasons why someone would give a poor effort and one of them is if you have a history of failure in academic settings[;] you might go too quickly or you might not give optimal effort because you just assume it's not going to make any difference."

Anderson did not administer any IQ testing when she examined applicant. She did not testify about the reliability of any particular IQ test or IQ score reflected in the record.[43] She acknowledged that factors unrelated to a person's actual mental ability can lower test scores, including depression, psychosis, and external motivations to obtain a lower score, such as facing the death penalty.[44]

Compton disregarded applicant's OLMAT and Slosson scores, stating that those instruments were

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[43] Anderson's report contains a paragraph discussing some of applicant's IQ test scores, identifying the IQ test by the year of administration. The record does not support Anderson's representation of applicant's IQ scores, including her assertion that, in 1989, applicant obtained "a full scale IQ of 71" which "did not deviate much from prior scores." The record before us indicates that the only IQ score of 71 that applicant obtained was an estimated full scale IQ score of 71 on an abbreviated WAIS-R administered to him by TDCJ in 1984. Anderson appears to challenge the validity of applicant's IQ scores on the 1973 WISC (78 IQ) and 1989 WAIS-R (74 IQ), but the basis for her criticism is unclear.

[44] The MMPI administered by TDCJ in 1984 concurrently with the abbreviated WAIS-R revealed elevations on the psychotic scales and a significant probability of psychiatric disturbance.

group tests and lacked high validity. Compton indicated that applicant's 1972 Slosson score was particularly problematic due to research suggesting that, in the 1970s, the Slosson had extremely poor validity in determining intellectual disability. Compton also disregarded the Bender Gestalt and Goodenough tests because they were neuro-psychological screening instruments rather than IQ tests.

Compton testified that applicant's 78 IQ score on the WISC was the most reliable IQ score reflected in his records because it was the first and only full scale, individually administered IQ test given during the developmental period. Compton stated that, because she could not tell whether applicant took the original WISC or the WISC-R, she made alternative Flynn Effect adjustments to his reported score: 69 to 70 IQ, assuming that applicant took the original WISC, and 73 to 74 IQ, assuming that he took the WISC-R. Compton noted that applicant's IQ might be higher than his Flynn-Effect-adjusted WISC score because family reports suggested that he was traumatized as a child by paternal abuse. Compton explained that childhood trauma can cause low IQ scores because the stressful environment makes it difficult for the child to get enough rest, focus, and learn.

Compton, who testified that she had worked in a prison system, doubted the validity of applicant's IQ scores on TDCJ-administered tests because prison IQ assessments do not typically include effort testing. Compton asserted that effort testing is important when assessing cognitive deficits because, if the subject is not exerting effort, the assessment will inaccurately represent his ability.

Compton also stated that many inmates are depressed and that depression can lower IQ scores. Although TDCJ never formally diagnosed applicant with depression, he exhibited withdrawn and depressive behavior throughout his time on death row, and he demonstrated similar behavior earlier in his life. Compton also noted a 2005 TDCJ report stating that applicant wrote a suicide note, although the report indicated that applicant denied having written it.[45] Compton testified that applicant's affect was flat during her evaluation and he seemed a little depressed. Although he denied being currently depressed, applicant admitted that he had experienced some depression in the past. And while applicant was not formally diagnosed with depression during his schooling, school officials twice recognized that he was experiencing emotional disturbances.

Compton did not consider applicant's 59 IQ score on the WAIS-IV that she administered to be valid due to persistent indicators throughout her assessment that applicant was exerting suboptimal effort.[46] After interviewing him about his personal history, Compton gave applicant the Test of Memory Malingering (TOMM), an effort test. Compton testified that applicant's results suggested that he was not exerting full effort, even when she gave him the benefit of the doubt by assuming that he was intellectually disabled and applying only the specific norms for intellectually

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[45] The record shows that 2005 is the same year in which applicant wrote a letter to the habeas court, asking the court to allow him to withdraw his appeals and to set his execution date, and later filed a *pro se* motion requesting the same relief.

[46] Compton testified that she adjusted applicant's WAIS-IV score to 57 to account for the Flynn Effect.

disabled individuals.[47] When Compton subsequently administered the WAIS-IV, applicant obtained a full scale IQ score that was significantly lower than she had expected.[48] Further, Compton stated, her analysis of applicant's WAIS-IV results revealed pervasive internal discrepancies that indicated suboptimal performance.

Compton testified that her analysis of applicant's WAIS-IV results also revealed a significant discrepancy between the crystallized knowledge that applicant had demonstrated in 1989 intelligence testing and what he currently professed to know. When Compton asked applicant what a thermometer was, he told her that he did not know, although he had answered the same question correctly when an examiner had asked it in 1989. Compton stated that it was rare to simply forget the meaning of a previously known word and noted that both her own and Dr.

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[47] Compton disagreed that it was inappropriate to give effort tests to intellectually disabled individuals. She also testified that, according to the primary research, the TOMM has good reliability when administered to intellectually disabled people. Compton also assessed applicant's effort through embedded measures in the IQ and memory tests she administered. She stressed that, contrary to the assertions of applicant's experts, these embedded measures were normed on intellectually disabled people. And to give applicant the greatest benefit of the doubt, Compton did not compare his scores to the overall clinical sample when interpreting his results on the embedded effort measures. Instead, Compton compared applicant's scores to the norms for individuals who were known to be intellectually disabled, those for individuals with traumatic brain injuries (TBIs), those for people with only eighth-grade educations, and those for people of different ethnicities and cultures.

[48] Compton testified that she had expected applicant to obtain a full scale IQ score in the 70s, based on what she had seen, applicant's history, and his education level.

Anderson's testing had placed applicant's memory in the low-average range. When Compton checked the validity of her WAIS-IV testing with additional effort testing, the results (lower than expected scores and indications of suboptimal effort) were very similar to applicant's WAIS-IV results.

The record does not support considering applicant's IQ scores on the OLMAT, Slosson, 1984 abbreviated WAIS-R, 2013 RCPM, or derived IQ scores on the Bender Gestalt and Goodenough tests given in 1973, because of the evidence that these instruments were noncomprehensive screening or group IQ tests, neuropsychological tests rather than IQ tests, or derived IQ scores using the ratio method and concept of mental age rather than the degree of statistical deviation from the mean.[49] The record additionally does not support considering applicant's IQ score on the WAIS-IV, given the compelling evidence of his suboptimal effort on that instrument. We are left with applicant's 78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989.

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[49] According to the AAIDD,

> It is important to note that IQ scores derived from an intelligence test are now developed on the basis of a deviation (from the mean) score and not on the older conception of mental age. Thus, in reference to the significant limitations in intellectual functioning criterion for a diagnosis of [intellectual disability], a valid diagnosis of [intellectual disability] is based on how far the person's score deviates from the mean on the respective standardized assessment instrument and not on the ratio of mental age to chronological age.

INTELLECTUAL DISABILITY 35; *see also Penry*, 492 U.S. at 339–40 (O'Connor, J.) (noting that the "mental-age" concept is problematic in several respects).

Taking into account the standard error of measurement, applicant's score range on the WISC is between 73 and 83. The fact that applicant took a now-outmoded version of the WISC in 1973 might tend to place his actual IQ score in a somewhat lower portion of that 73 to 83 range. *See Cathey*, 451 S.W.3d at 18. However, the evidence that applicant was traumatized by paternal violence, was referred for testing due to withdrawn behavior, came from an impoverished and minority cultural background, and started to abuse drugs by the time of testing might tend to place his actual IQ in a somewhat higher portion of that 73–83 range. *Cf. id.* "Taken altogether, there is no reason to think that applicant's obtained IQ score" of 78 on the WISC "is inaccurate or does not fairly represent his borderline intelligence during the developmental stage." *Id.*

The score that applicant obtained on the 1989 WAIS-R supports the conclusion that his WISC score accurately and fairly represented his intellectual functioning during the developmental period.[50] Applicant's score range on the WAIS-R is between 69 and 79. As with the WISC, the fact that applicant took a now-outmoded version of the WAIS-R might tend to place his actual IQ score in a somewhat lower portion

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[50] In Addendum Findings 111 and 113, the habeas court asserted that applicant's score on the 1989 WAIS-R was likely affected by the practice effect because he was given an abbreviated WAIS-R the previous day. The findings are not supported by the record, which shows that, on January 26, 1989, TDCJ psychologist James Majors gave applicant the Vocabulary and Block Design subtests of the WAIS-R. On the following day, January 27, 1989, Majors administered the WAIS-R's remaining subtests. As such, the record does not support a finding that there was a duplication of subtests within a short period of time that resulted in an artificially high score on the 1984 WAIS-R.

of that 69 to 79 range. *See id.* However, by the time he took the WAIS-R, applicant had a history of academic failure, something that his own expert stated could adversely affect effort. Applicant also took the WAIS-R under adverse circumstances; he was on death row and facing the prospect of execution, and he had exhibited withdrawn and depressive behavior. These considerations might tend to place his actual IQ in a somewhat higher portion of that 69 to 79 range. *Cf. id.* Considering these factors together, we find no reason to doubt that applicant's WAIS-R score accurately and fairly represented his intellectual functioning as being above the intellectually disabled range. *See id.*

B. Significant, Related Deficits in Adaptive Behavior

Even if applicant had proven that he suffers from significantly sub-average general intellectual functioning, his *Atkins* claim fails because he has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning.

At the 2014 evidentiary hearing, Borda defined adaptive functioning as the ability to successfully do everyday things on one's own. But Borda also asserted that adaptive functioning describes a concept that is more complicated than being able to perform a certain specific task, such as balancing a checkbook. He characterized adaptive functioning as neuro-psychological or executive frontal-lobe functioning, such as the ability to make a decision, implement the decision, assess whether one is getting to a correct solution, and if not, to modify his behavior.

On direct examination, Borda agreed with habeas counsel's statement that applicant's family history

indicated that applicant had "strong" problems adapting, as to social behaviors and the academic realm. But Borda gave no more specific testimony about deficits in adaptive behavior. [51] On cross-examination and redirect, Borda acknowledged that standardized measures of adaptive functioning exist, that many adolescents with poor adaptive skills—for example, homeless teenagers—are not intellectually disabled, and that just because someone lacks certain skills does not mean that the person is intellectually disabled. Borda also acknowledged that applicant had adaptive skills during the developmental period, but opined that they were probably below average for someone of his age.

The State asked Borda whether evidence that applicant mowed grass for money and hustled pool suggested that he had money skills, knowledge that he needed to earn money, and the self-direction to obtain a job to make it. Borda suggested that he did not have sufficient information to render an opinion because he did not know whether applicant had independently thought of these ways to make money. Borda initially suggested that the offense facts did not indicate that applicant possessed adaptive skills, due to Borda's impression that others dragged applicant into it, that applicant went along because he was afraid to say no, and that no particular planning went into the offense. Borda stated that intellectually disabled people are

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[51] To the extent that, in his affidavit, Borda identified certain "marked" or "severe" deficits in applicant's adaptive behavior, the record does not support several of his factual assertions. In addition, Borda did not contend in his affidavit that the deficits he identified were related to significantly sub-average general intellectual functioning. In any event, the record does not support such a conclusion.

suggestible and, if told to do something, they will do it. But Borda acknowledged that he did not know much about the offense and had not read applicant's confession or trial testimony.

Greenspan testified that, for purposes of diagnosing intellectual disability, "adaptive functioning" concerns how one functions in the world. He stated that adaptive functioning is not the same as executive functioning, which is a cognitive measure that looks at certain underlying reasoning skills. On direct examination, Greenspan asserted that he saw no evidence of applicant's competence in any of the adaptive behavior areas. On cross-examination, Greenspan acknowledged that applicant had areas "of greater ability," but asserted that they did not exclude an intellectual-disability diagnosis. Although Greenspan stated that he was generally familiar with the facts of applicant's offense, he acknowledged that he had not read the transcript of either of applicant's two trials.

Greenspan testified that the Texas Independent Living Scale (TILS) given to applicant by Dr. Compton is a standardized test that is generally accepted within the psychological community and considered a direct measure of adaptive behavior. He emphasized that applicant scored two-and-a-half standard deviations below the mean on the TILS.

Greenspan minimized the evidence that applicant had learned to survive on the street and in prison. Despite his earlier definition of adaptive behavior, Greenspan asserted that applicant's ability to function in prison and street environments did not necessarily reflect "adaptive" behavior, as that term is understood by the psychological community. Greenspan did not think that any of applicant's performance on the

following activities evidenced adaptive skills: (1) in preparation for his new punishment trial, consulting with counsel about whether to inform the jury that he had been on death row; (2) concealing a shotgun in a shopping bag when entering a store to rob it; (3) attempting to conceal his appearance during the offense by wearing a wig and sunglasses, and after the offense, changing his appearance by shaving his head; (4) arguing with accomplices over how to divide the proceeds of the crime; (5) deciding to stipulate that he had prior criminal convictions and responding appropriately to questioning by the court to determine whether the stipulation was voluntary, knowing, and intelligent; (6) writing four letters to his appellate lawyer that escalated from, "When are you going to file my appeal?," to "I object to you getting any extensions" to "Why won't you respond to any of my letters?" to "I object to you being my lawyer from this point forward"; (6) hustling pool; and (7) working as a barber and a porter in prison.

Anderson testified that she conducted a group interview of applicant's relatives to determine whether applicant had any longstanding, chronic deficits. From applicant's relatives, Anderson learned that he had unspecified deficits that were seen early and reported by his school. Applicant's relatives also told Anderson that he was never left alone, someone had to "hold his hand," and he needed help with his homework.[52]

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[52] In her report, Anderson stated that, during the developmental period, applicant "had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which fall primarily under socialization, communication, and cognition."

Anderson acknowledged that, if a person donned a wig before entering a business to commit robbery, it indicated some forethought and planning, but she could not say whether the behavior showed an ability to protect one's self-interest. Anderson had no opinion on whether walking into the business with a shotgun concealed in shopping bags demonstrated an ability to plan ahead and protect one's self-interest. Anderson testified that committing a crime and then fleeing to another city did not necessarily demonstrate the ability to form and execute a plan for self-preservation. Anderson denied seeing evidence that applicant had excelled in any way since being imprisoned.

Compton stated that adaptive functioning examines everyday social, practical, and conceptual skills. She testified that she gave applicant a TILS test and acknowledged that applicant's TILS score fell two-and-a-half standard deviations below the mean. But Compton explained that the TILS score was not an accurate representation of applicant's abilities because she had to assign zeroes to questions asking about areas to which applicant had no exposure, such as writing a check and using a microwave oven.

When Compton gave applicant a complete WRAT-4, a test of academic abilities, his results fell within the second-grade level for mathematical skills and the third-grade level for reading comprehension and writing skills. Compton noted that applicant's writing ability scores on the WRAT-4 were inconsistent with the seventh-grade level ability he had demonstrated in letters he had written to friends. Compton testified that applicant's performance on the WRAT-4 math subtest was also internally inconsistent. Although applicant was able to perform advanced math at certain times, at other times, he missed very simple

questions. Applicant's performance on the WRAT-4 math subtest was also inconsistent with abilities he had demonstrated elsewhere, including in his commissary records. Compton testified that these inconsistencies increased the probability that applicant was not exerting full effort on the WRAT-4 math subtest.

Compton testified that she found some limitations in applicant's academic skills and some adaptive deficits in social interaction during the developmental period, but she also saw evidence of adaptive skills. For example, she saw evidence that applicant had lived in the back of a pool hall, as well as evidence that he had played pool and mowed lawns for money. Compton said that living on the streets in itself required applicant to engage in adaptive behavior. She opined that playing pool and mowing lawns showed some ability to understand money and work concepts.

Compton also saw evidence that applicant possessed adaptive skills at the time of the offense and original trial. Applicant's behavior surrounding the crime (wearing a wig, covering up the gun, and fleeing to Louisiana) all indicated planning, forethought, and an appreciation of the need to do something to avoid apprehension, which also related to his ability to engage in abstract thinking.

Compton added that applicant's 1980 trial testimony indicated that he had some ability to engage in abstract reasoning because he was able to conceptualize what his counsel and the State were asking and to form appropriate and exculpatory answers. Compton noted that applicant withstood both direct and cross examination and he testified in a coherent fashion. Compton stated that testifying and undergoing cross examination is a stressful experience

for most people. Applicant's 1980 trial testimony also showed that he was able to process and respond to questions without significant difficulty even under stressful conditions. Applicant's testimony showed that he could conceptualize the process and form exculpatory responses and alternative explanations, which further indicated an ability to process and manipulate information and form a response. Compton acknowledged that defense counsel may have prepared applicant for his 1980 trial testimony, but she noted that applicant had not had a lawyer to coach him for his 1983 *Faretta* hearing, at which he represented himself. Applicant had been able to understand what the trial court was asking him at the *Faretta* hearing and had responded appropriately, although he had difficulty with some of the legal issues.

Compton also saw evidence that applicant had developed adaptive skills in prison. In addition to representing himself at the 1983 *Faretta* hearing, applicant had learned to read and write in prison. His personal, handwritten correspondence demonstrated a seventh-grade writing ability. Compton indicated that applicant's writing ability could exceed a seventh-grade level if he also wrote the various handwritten and typewritten *pro se* motions presented at the evidentiary hearing. Regarding the handwritten *pro se* motions, Compton observed that the handwriting was very similar to the handwriting that she had seen throughout her review of applicant's case. Regarding the typewritten documents, Compton testified that applicant told her that he did not know how to type and that she had been told that he did not own a

typewriter.[53] Compton also acknowledged that inmates share pleadings and that Fronciewiz had testified that inmate David Harris had worked for applicant at one time.[54] But Compton testified that simply being involved in the process by copying the motions by hand would indicate understanding and require the ability to write. Compton opined that copying a legal motion would be something within the realm of only a few intellectually disabled people.

Compton found additional evidence of adaptive skills in applicant's TDCJ records. She testified that a disciplinary report stated that another inmate had been in applicant's cell to play dominoes. Compton opined that this indicated that applicant possessed social interaction skills and the ability to count because the game of dominoes required that skill.[55]

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[53] It is unclear from the record who told Compton that applicant did not own a typewriter. Regardless of the source of this information, applicant's TDCJ records filed with the habeas court include a property receipt from the commissary. The receipt, which is dated March 11, 1993, and bears applicant's name, is for an electronic word-processor.

[54] We note that Harris was not convicted of capital murder until April 29, 1986, and was executed in June 2004. *See Ex parte Harris*, 136 S.W.3d 669 (Tex. Crim. App. 2004). Although applicant's TDCJ records show requests for legal visits with other inmates, the earliest such request is dated May 21, 2002. The earliest request for a legal visit with Harris, in particular, is dated June 29, 2002. The latest request for a legal visit with Harris is dated April 20, 2004. Accordingly, it does not appear that Harris could have assisted applicant with his *pro se* filings received by this Court and the trial court between October 1980 and July 1983.

[55] On cross-examination, Compton acknowledged that the disciplinary report did not show that applicant agreed about why the inmate was present and that the reporting officer did not state that he actually saw applicant playing dominoes. But

Compton noted that applicant's TDCJ classification file included a letter and questionnaire from TDCJ to the manager of Two-K restaurant, where applicant had previously worked. Compton agreed that the manager's responses showed that applicant could function in the capacity for which he had been hired. Regarding disciplinary problems, the manager had written that applicant was "capable of influencing others to dissent [and] like[d] confrontation." Compton testified that the comment evidenced applicant's conceptual and leadership skills.

Compton agreed that applicant's classification file also included a Social Summary, dated December 1, 1983, in which applicant had cited the advice of counsel and declined to discuss his offense. Compton stated that the fact that applicant declined questioning on the advice of counsel showed that he had the ability to understand instruction, conceptualize it, and act on it. Compton testified that incidents documented in applicant's death-row disciplinary records demonstrated his ability to form the intent to influence other people and to act on it, which fell within the social-skills domain, and the ability to stand up to authority, which was inconsistent with suggestibility and gullibility.

Compton also found evidence of adaptive skills in items that had recently been found in applicant's cell. Compton stated that a packet of handwritten letters, which were all in the same handwriting, had a seventh-grade-level readability score. She testified that a composition notebook found in applicant's cell

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Jemma Levinson's notes of her May 25, 2000 interview with applicant, offered in his Factual Supplement, show that applicant told Levinson that he played dominoes with another inmate, and he referred to a disciplinary incident stemming from this activity.

contained the same handwriting throughout it. Although Compton acknowledged that applicant might have copied some of the notebook's contents from other sources, she indicated that other parts might have been the product of applicant's independent thought. The composition book contained a handwritten table matching the Wechsler Scales's normal distribution of IQ scores, which suggested to Compton that applicant was investigating IQ scores from his prison cell.

Compton agreed that books, a newspaper, and newspaper articles were found in applicant's cell. Each of the books, which included copies of the Qur'an and Know Your Islam, had applicant's name, inmate identification number, and a date written inside the cover. One of the articles concerned winning an appeal. Many of the books and newspaper articles found in applicant's cell contained underlining. Compton testified that an underlined passage could indicate that a person is reading and comprehending the underlined text. Although Compton acknowledged that people sometimes also underline passages that they do not fully understand, she testified that the action of underlining indicates the person's desire to return to the passage and review it, and thus still involves processing and conceptualization. Compton also stated that even if a person underlines passages because he does not understand them, the act implies that he has understood the surrounding text.

Other items found in applicant's cell included heavily notated calendars for the years 2012 through 2014. Compton testified that notations on the calendars indicated that applicant understood the concept of months, an understanding that he also demonstrated in Compton's testing. She agreed that

the calendars had sections for people's names, addresses, and telephone numbers, all of which were appropriately completed.

Compton also found it significant that applicant's expert witnesses at the 2001 punishment retrial (i.e., Halpin and Wright) determined that applicant's adaptive abilities had progressed since his imprisonment and that his progress indicated that he had a strong ability to learn. Compton noted that another witness at the 2001 retrial, Jo Ann Cross, had echoed Halpin's and Wright's testimony regarding applicant's ability to learn.

We find Compton's opinion far more credible and reliable than those of applicant's experts who testified at the 2014 evidentiary hearing.[56] The record shows that Compton is a forensic psychologist with considerable experience in conducting forensic evaluations. Her testimony shows that she thoroughly and rigorously reviewed a great deal of material concerning applicant's intellectual functioning and adaptive behavior. In addition, she personally evaluated applicant. During that evaluation, Compton administered comprehensive IQ testing via the WAIS-IV, a gold-standard test; various forms of effort testing to assess the validity of her IQ testing; and the TILS, a standardized measure of adaptive functioning. Compton testified in detail about why, even applying the most lenient standards, the results of her effort

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[56] Although applicant presented Garnett's and Vitale's affidavits in support of his *Atkins* claim, neither affiant personally examined applicant and neither purported to diagnose applicant as intellectually disabled. Further, neither Garnett or Vitale testified at the evidentiary hearing. The bases for the assertions in their affidavits were therefore not subject to adversarial testing through cross-examination.

testing suggested that applicant had exerted suboptimal effort on the WAIS-IV. Compton also gave persuasive and unrebutted testimony explaining why applicant's score on the TILS under-represented his adaptive skills. She further detailed numerous examples in applicant's records that demonstrated his adaptive skills.

In contrast, Borda, Greenspan, and Anderson were clinical psychologists or clinical neuro-psychologists whose credibility suffered from their review of relatively limited material. Greenspan did not personally assess applicant, and his testimony suggested that his direct experience with IQ testing was fairly limited and remote in time.

Although he personally examined applicant, Borda conceded that the assessment was extremely brief and did not include comprehensive, full-scale IQ testing with a gold-standard instrument or effort testing. Borda and Greenspan also premised many of their conclusions on the concept of mental age and used the unreliable ratio method to calculate IQ scores from instruments that were not designed for such purposes. Although Anderson personally examined applicant, she did so for a purpose other than evaluating him for intellectual disability. Further, Anderson did not administer any test for the purpose of obtaining an IQ score and, from her testimony, she appeared to have completed relatively few intellectual-disability assessments.

Further, each of applicant's experts who testified at the evidentiary hearing appear to have applied a more demanding standard to the issue of adaptive behavior than we have contemplated for Eighth Amendment purposes. *See Cathey*, 451 S.W.3d at 19, 26–27

Although Borda testified that adaptive functioning is the ability to successfully do everyday things on one's own, he also characterized it as executive functioning.[57] Greenspan defined adaptive behavior as how one functions in the world and expressly acknowledged that adaptive behavior and executive functioning are distinct concepts. However, Greenspan's application of the definition to the evidence—for example, his minimization of the evidence that applicant had learned to survive on the street and in prison—suggest that he was actually applying a more stringent standard. Alternatively, it suggests that Greenspan's opinions were not reasonable. Anderson was not asked to define adaptive functioning, but in her testimony, she often equated adaptive functioning with executive functioning.

Compton's opinion finds further support in applicant's school records, which were accurately summarized at the 2001 punishment retrial by applicant's expert witness, Dee Dee Halpin. *See Cathey*, 451 S.W.3d at 23 (stating that the best source of retrospective information concerning adaptive

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[57] Borda's definition of adaptive functioning as executive functioning appears to be inconsistent with the clinical standards that he purported to follow. According to Borda's affidavit, the DSM-V recognizes executive-functioning measures as more reliable indicators of intellectual functioning than IQ tests. But his affidavit is silent concerning whether the DSM-V recognizes executive-functioning measures as more reliable indicators of adaptive functioning than a standardized measure of adaptive functioning, for example. Borda appears to have imported the DSMV's recognition of executive-functioning measures in the intellectual-functioning context into the adaptive-functioning context. In the process, Borda seems to have implicitly transformed "adaptive functioning" into something more complex than the ability to perform a task.

behavior during the developmental period is usually school records because they provide an objective, unbiased documentation of a person's abilities at the most pertinent time). Those records reflect applicant's poor academic grades (especially in areas involving language), uneven conduct grades, retention in first grade, below-grade-level scores on academic-achievement tests, and references to instances of withdrawn behavior. In kindergarten, a physician considered the possibility that applicant's withdrawn behavior was due to intellectual disability, although the physician indicated that emotional problems were the more likely cause. Subsequent IQ testing on a gold-standard instrument yielded a score that was not in the intellectually disabled range—even considering the extreme low end of the scoring range—and applicant remained in regular classrooms throughout his time in school.

Although Compton found that applicant manifested some limitations in academic and social-interaction skills during the developmental period, she testified that his level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis. But even assuming for purposes of argument that applicant's limitations in academic and social-interaction skills were significant, the record does not support a finding that these deficits were linked to significantly sub-average general intellectual functioning. *See Hearn*, 310 S.W.3d at 428. Rather, the record overwhelmingly supports the conclusion that applicant's academic difficulties were caused by a variety of factors, including trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary schools three times in three years, racially motivated

harassment and violence at school, a history of academic failure, drug abuse, and absenteeism. The same is true of any social difficulty that applicant experienced during the developmental period.[58]

The significant advances applicant has demonstrated while confined on death row further support the conclusion that his academic and social difficulties were not related to significantly sub-average general intellectual functioning. In addition, our consideration of the *Briseno* evidentiary factors weighs heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning.

The first *Briseno* factor considers whether those who knew applicant best during the developmental stage considered him to be intellectually disabled and acted in accordance with that determination. *Briseno*, 135 S.W.3d at 8. The evidence does not weigh in applicant's favor.

Although the physician who examined applicant before kindergarten considered intellectual disability as a possible cause for applicant's withdrawn behavior, the physician contemporaneously stated that emotional problems were the more likely cause. Applicant's records do not reflect any intellectual-disability diagnosis, and they do show that he remained in normal classrooms during his school career.

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[58] Although the record contains evidence of withdrawn behavior by applicant, we note that the record also includes abundant evidence of applicant's social success during the developmental period.

At the evidentiary hearing, habeas counsel attempted to show that applicant's father singled applicant out for abuse and threw applicant out of the house because he perceived applicant as being intellectually disabled or "slow." However, the record is replete with evidence that Junior physically and emotionally abused all of his children, as well as with evidence that Junior also drove some of applicant's siblings from the family home. Although there is evidence that applicant's inability to spell on command may have angered Junior, there is abundant evidence from multiple sources that applicant was the target of Junior's ire because he intervened in his parents' altercations, tried to protect his mother and other siblings from Junior, and often caught Junior in infidelity. The record also indicates that applicant was left in charge of his younger siblings. And applicant's sister, Colleen McNeese, testified at the 2014 evidentiary hearing that she had not considered applicant to be intellectually disabled.

Regarding the second *Briseno* factor, the evidence shows that applicant formulated plans and carried them through. *See id.* The various affidavits, testimony, and interviews that applicant's relatives have given indicate that, when he and his siblings were hungry, applicant took it upon himself to earn money from the neighbors and then used the money to buy food. During his 1980 trial, applicant insisted on presenting an alibi defense, and his testimony was consistent with that defense. He doggedly pursued his desire to obtain new appellate counsel after his 1980 trial by writing to various courts, attorneys, and organizations, filing pleadings and motions, and marshaling exhibits to present at the 1983 *Faretta* hearing. The previously mentioned conduct and incidents in applicant's prison disciplinary records

also indicate leadership, the third *Briseno* factor. *See id.*

The fourth and fifth *Briseno* factors address whether applicant responds rationally and appropriately to external stimuli and whether he responds coherently, rationally, and on point to oral or written questions. *See id.* The many instances of applicant's testimony and interactions with courts over the course of this case, as well as the testimony of witnesses at his 2001 punishment retrial, indicate that the answers to these questions are yes.

The varying statements that applicant gave to police about the offense and his 1980 and 1993 testimony indicate that he can hide facts or lie effectively in his own interest, the sixth *Briseno* factor. *See id.* The facts of the offense further indicate that it required forethought, planning, and moderately complex execution of purpose, the final *Briseno* factor. *See id.* at 8–9.

C. Onset During the Developmental Period

Given applicant's failure to prove by a preponderance of the evidence that he suffers from significantly sub-average general intellectual functioning and that any significant deficits in adaptive behavior are related to significantly sub-average general intellectual functioning, he has not established that he was intellectually disabled before the age of eighteen. *See id.*

In sum, we conclude that for Eighth Amendment purposes, applicant is a person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior. *See Cathey*, 451 S.W.3d at 26–27 (summarizing the "basic factual nature of the *Atkins* inquiry"). We

therefore reject applicant's contention that he is exempt from execution under *Atkins*.

IV. Conclusion

For the reasons discussed above, we deny relief on applicant's first claim after assuming our role as the ultimate fact-finder in this case regarding applicant's assertion that he is entitled to relief under *Atkins*. *See Flores*, 387 S.W.3d at 634–35; *Reed*, 271 S.W.3d at 727.

The habeas court did not enter findings of fact and conclusions of law regarding applicant's second and third claims for relief. In his second claim, applicant contends that he was denied due process because Texas's death-penalty statute does not contemplate intellectual disability as a bar to the execution of an intellectually disabled individual. In his third claim, applicant contends that his death sentence violated the Sixth Amendment under *Atkins* and *Ring v. Arizona*, 536 U.S. 584 (2002), because the jury's verdict did not include a determination of an essential element of capital murder—that he is not intellectually disabled. Applicant's briefing concerning his second claim is inadequate because he fails to plead and prove facts which would entitle him to relief. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The Court has previously rejected the *Ring* argument that applicant raises in his third claim. *See Briseno*, 135 S.W.3d at 10. Applicant's second and third claims for relief are denied.

As to applicant's remaining claims (Claims 4–48), we find that the record supports the habeas court's findings of fact, conclusions of law, and recommendation. We accordingly adopt "Respondent's Proposed Findings of Fact, Conclusions of Law, and

Order" regarding Claims 4–48, and deny relief on all of applicant's claims.

Delivered: September 16, 2015

Publish

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for Writ of Habeas Corpus
in Cause No. 314483-C in the 185th
Judicial District Court Harris County

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

As recommended by the habeas judge, it is time for Texas to reevaluate the decade-old, judicially created standard in *Ex parte Briseno* in light of a shift in the consensus of the medical community regarding what constitutes intellectual disability, and in light of the Supreme Court's recent holding in *Hall v. Florida* indicating that courts are required to consider that consensus in assessing intellectual-disability claims.[1] *See Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004); *Hall v. Florida*, __U.S.__, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) . In the absence of any legislative guidance, this Court created the *Briseno* standard as

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[1] Whereas older case law uses the term "mental retardation," newer statutes and cases use the term "intellectual disability." I employ the latter term whenever possible.

a temporary solution to the problem of defining "that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty."[2] *Briseno*, 135 S.W.3d at 6. The standard was created in response to the Supreme Court's two-part holding in *Atkins v. Virginia* that (1) the Eighth Amendment of the federal Constitution prohibits the execution of a person with an intellectual disability as cruel and unusual punishment, and (2) each state must devise its own substantive and procedural mechanisms for determining which offenders are so intellectually disabled that there is a national consensus that it would be cruel and unusual to execute them. *Atkins v. Virginia*, 536 U.S. 304, 306, 321, 122 S. Ct. 2242 (2002). In response to *Atkins*'s first holding, the *Briseno* Court applied the same three-pronged general standard that had been employed by the Supreme Court to define intellectual disability. *Briseno*, 135 S.W.3d at 8. The standard was based on the American Association on Mental

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[2] Merely lamenting the Texas Legislature's failure to act in the decade since *Atkins* was decided abdicates this Court's responsibility to ensure that federal constitutional rights are fully protected in Texas. *See Atkins v. Virginia*, 536 U.S. 304, 306, 321, 122 S. Ct. 2242 (2002). This Court cannot continue to apply an outdated and erroneous standard in the wishful hope that the Legislature will act soon, particularly in light of the fact that the legislative session just ended several months ago, and the Legislature does not meet again for approximately two years. Although it would obviously be preferable for the Legislature to set forth the policy with respect to who should be exempted from the death penalty on the basis of intellectual disability, this Court is required to uphold the federal Constitution as it has been interpreted by the Supreme Court. Doing what we have always done simply because the Legislature has not told us to do it otherwise is not the right answer.

Retardation (AAMR) criteria,[3] and it required an applicant to demonstrate evidence of (1) significantly subaverage general intellectual functioning, (2) related limitations in adaptive functioning, and (3) onset of the two preceding prongs prior to the age of eighteen. *Id* at 7. In response to *Atkins*'s second holding requiring each state to develop its own mechanisms for determining which offenders should be exempt from the death penalty on the basis of their intellectual disability, the *Briseno* Court initially "decline[d] to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature,"[4] but it then went on to

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[3] *See* American Ass'n on Mental Retardation: *Mental Retardation: Definition, Classification & Systems of Supports* (9th ed. 1992). This definition is substantively the same as the one in Texas Health and Safety Code Section 591.003(13), and *Briseno* held that these definitions were appropriate as the general standard for deciding intellectual-disability claims in capital-murder cases. *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004). Because the *Briseno* Court indicated that the definition in the Health and Safety Code was interchangeable with the definition used by the American Association on Mental Retardation, I refer only to the AAMR definition, even though the analysis would also substantively apply to the definition in the Health and Safety Code.

[4] *See Briseno*, 135 S.W.3d at 6; *see also id.* at 8 ("Some might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment. However, that definitional question is not before us in this case because applicant, the State, and the trial court all used the AAMR definition. Until the Legislature provides an alternate statutory definition of mental retardation for use in capital sentencing, we will follow the AAMR or Section 591.003(13) criteria in addressing *Atkins* mental retardation claims.")

discuss a standard comprising seven evidentiary considerations, which, in practice, has been applied to determine whether an applicant's intellectual disability rises to the "level and degree" that a consensus of Texas citizens would agree that the death penalty would constitute cruel and unusual punishment. *Id.* at 6, 8-9. Thus, rather than separately consider the two steps by keeping the medical considerations apart from the legal ones, *Briseno* instead has been interpreted as conflating the two steps into a single analysis. By placing the legal standard's seven evidentiary considerations into the adaptive-deficits analysis in the medical standard, as this Court's majority opinion does today, the *Briseno* Court created a novel test for assessing claims of intellectual disability that has been widely criticized as applying an unscientific standard.[5] More importantly, *Briseno*

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[5] *See, e.g.*, Nancy Haydt, Stephen Greenspan, & Bhushan Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 U. MISS-KANSAS CITY L. REV. 359, 384 (2014) (observing that *Briseno* set forth a "list, for which no scientific justification was given" of "vaguely specified seven behaviors which the court believed could be used to rule out a diagnosis of ID"); John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY RTS. J. 393, 399 (2014) (Texas's *Briseno* factors make it "extraordinarily difficult to prove deficits in adaptive functioning"); Kate Janse Van Rensburg, *The DSM-5 and Its Potential Effects on* Atkins v. Virginia, 3 U. MEMPHIS SCHOOL OF L. MENTAL HEALTH L. & POL'Y J. 61, 79 (2013) ("Texas' definition has not been successful in achieving any of *Atkins*' aims but has been successful in severely limiting the number of defendants who were actually found to be intellectually disabled."); John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18

conflicts with the Supreme Court's rationale in *Hall* in that its test for determining intellectual disability is not grounded in the current consensus of the medical community. There is no authority, medical or legal, that supports this kind of hybrid assessment of intellectual disability. This Court should take this opportunity to modify the *Briseno* test to require a bifurcated inquiry.

First, a court should determine whether a defendant is intellectually disabled based on the current standards employed by the medical community in the manual of the American Association on Intellectual and Developmental Disabilities (AAIDD, formerly known as the AAMR). Because this Court's majority opinion continues to apply the former medical standard that was in effect in 2004, rather than the prevailing views held by the medical community today, I would modify this portion of *Briseno* to reflect the current standards. In applying the current scientific standards to this case, I would hold that an IQ score is not definitive evidence of a lack of intellectual disability in a case such as this, where the majority of numerous IQ tests spanning decades have consistently indicated that applicant is in the range of an intellectually disabled person, and the habeas court

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CORNELL J.L. & PUB. POL'Y 689, 710 (2009) ("The *Briseno* factors present an array of divergences from the clinical definitions."); James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later—A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 383-84 (2014) ("The Supreme Court's emphasis on scientific and clinical understanding of intellectual disability calls into question the approach by a few courts that rest heavily on stereotypes about people with intellectual disability rather than on the scientific knowledge and experience accumulated by professionals in the field.").

found that evidence credible by determining that applicant has proven the first prong of his *Atkins* claim. Furthermore, in determining whether a defendant is intellectually disabled, I would hold that it is improper to commingle the seven evidentiary considerations that comprise the legal standard described in *Briseno* with the analysis of adaptive deficits pertinent to the medical community's standard, and I would clarify that the legal and medical inquiries are separate and should be subject to distinct analyses.

Assuming that the evidence shows that a defendant is intellectually disabled according to the current medical standards, then a court would progress to the second step that requires a determination of whether the extent of his intellectual disability is such that, as a matter of federal constitutional law, his execution for capital murder would constitute cruel and unusual punishment in violation of the Eighth Amendment. It is only at this second step that a court should consider the type of evidence that is focused on the comparison and weighing of positive skills against deficits, similar to the seven evidentiary considerations in *Briseno*, so as to determine whether there would be a national consensus that a person at that level and degree of disability should not be subject to the death penalty. Furthermore, with respect to the second step, I would reformulate the seven evidentiary considerations described in *Briseno* so that they more closely track the types of considerations that persuaded the Supreme Court to decide that the execution of an intellectually disabled person would violate the Eighth Amendment.

In sum, I disagree with the majority opinion's conclusions that this Court properly "continue[s] to follow the AAMR's 1992 definition of intellectual

disability" and that the *Briseno* standard "remains adequately 'informed by the medical community's diagnostic framework.'"[6] Because the decade-old *Briseno* standard was never intended to be permanent, it has become necessary to examine whether its continued application remains consistent both with the views currently held by the scientific community and with the societal consensus as to those offenders who, by virtue of their intellectual disability, should be exempted from the death penalty. *See Briseno*, 135 S.W.3d at 5 ("[W]e must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims."). After reformulating the standard, I would remand this case for the habeas court to consider whether, under the revised standard, it recommends granting relief to Bobby James Moore, applicant. I, therefore, respectfully dissent.

I. Step One: A Court Must Decide Whether a Defendant Has an Intellectual Disability By Applying Current Scientific Standards

In light of both *Atkins* and *Hall*, a court reviewing an intellectual-disability claim is compelled to consult current medical standards in determining whether a particular offender falls within the medical definition of an intellectually disabled person. Although this Court is applying (A) the Supreme Court's same three prongs that make up the general standard for deciding whether a person has an intellectual disability, this Court's majority opinion is flawed in its substantive assessment of the first two prongs because, in contravention of current medical standards, (B) it improperly

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[6] *See* maj. op., at 5-6 (quoting *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014)).

applies a strict cutoff based on IQ scores, and (C) it erroneously applies unscientific criteria to assess whether a defendant has adaptive deficits.

A. The Supreme Court Requires a Court to Consider Current Medical Standards in Evaluating Whether the Evidence Establishes the Three-Pronged General Standard for Intellectual Disability

Although it set forth a general standard, the Supreme Court in *Atkins* left it to the states to devise a precise test for determining which offenders are so intellectually disabled that there is a national consensus that it would be cruel and unusual to execute them. *Atkins*, 536 U.S. at 317 (explaining that prohibition on executing intellectually disabled individuals extends to those "mentally retarded offenders about whom there is a national consensus," but leaving to the states "'the task of developing appropriate ways to enforce the constitutional restriction'") (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416 (1986)). But the Court in *Atkins* did not permit States to have complete autonomy in making this determination. *See Hall*, 134 S. Ct. at 1999 ("*Atkins* did not give the states unfettered discretion to define the full scope of the constitutional protection"; "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity"). In *Hall*, the Supreme Court characterized its *Atkins* decision as providing "substantial guidance on the definition of intellectual disability." *Id.* (citing *Atkins*, 536 U.S. at 318). The *Atkins* Court observed that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as

communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 U.S. at 318. Recognizing that there is a wide range of individuals who might be characterized as intellectually disabled, and recognizing that not all such individuals would be constitutionally exempted from the death penalty, the Supreme Court described the group of people whose executions would violate the federal Constitution as those who, "[b]ecause of their impairments, [ ] by definition [ ] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* Further describing the class of intellectually disabled people who are exempt from the death penalty, the Court also noted that "there is abundant evidence that [such individuals] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.* In providing these descriptions, the *Atkins* Court acknowledged the standards set forth in the manual of the American Association on Mental Retardation and the Diagnostic and Statistical Manual of Mental Disorders-IV (DSM-IV).[7] *Id.* at 308 n. 3.

More than a decade after the *Atkins* decision, the Supreme Court reaffirmed the general standard for determining intellectual disability in *Hall*. *See Hall*, 134 S. Ct. at 1994 ("As the Court noted in *Atkins*, the medical community defined intellectual disability

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[7] *See* American Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification & Systems of Supports* (9th ed. 1992); American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000).

according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period."). Addressing the first prong in the general standard, the *Hall* Court held that, because the medical community's diagnostic framework does not quantify intellectual disability at an IQ score of seventy or below, it would violate the federal Constitution to limit the protections of the Eighth Amendment only to those offenders whose test scores are at or below that precise level. *Id.* at 1998. In reaching that holding, the Court considered and was persuaded by the medical community's current diagnostic framework. *Id.* at 1993, 2000 (stating that the "legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework," and further observing that "it is proper to consult the medical community's opinion").

Viewed in conjunction, *Atkins* and *Hall* reveal that, for over a decade, the Supreme Court has applied the same three-prong general standard for analyzing intellectual-disability claims. Furthermore, *Hall* in particular signals that, even if a state is applying this same general standard, as did Florida in *Hall*, the federal Constitution may nonetheless be violated based on the particular analytical measures by which the state determines each of the three prongs. Even though the purpose of Florida's statute was to provide a legal standard that would permit anyone with an IQ level above 70 to be subject to the death penalty, the Supreme Court held that Florida's standard was constitutionally invalid because it was "in direct opposition to" the current medical standard for

diagnosing intellectual disability, which does not provide for a cutoff in that manner. *See id.* at 2001. Having permitted each state to create its own test for deciding which people with intellectual disability would be exempt from the death penalty, the Supreme Court nonetheless held that, in the implementation of that policy decision, Florida had no discretion to misapply the current standards of the medical community for assessing intellectual disability. *See id.*

The present case presents a situation analogous to that in *Hall* in that, in the implementation of a policy decision describing who should be constitutionally exempted from the death penalty, Texas has no discretion to misapply the standard of the current medical community for assessing intellectual disability. *See id.* at 1999-2001. I would hold that this Court must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and that the reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable.

To this end, I would modify this Court's analysis in *Briseno* so that it conforms to the current consensus of the medical community. Like the Supreme Court in *Atkins*, *Briseno*'s analysis of intellectual disability was premised on the definition in the AAMR's ninth edition, but since the time that *Atkins* and *Briseno* were decided, the AAMR has been renamed to the AAIDD, and it is now in its eleventh edition.[8] Rather than rely on the older editions, the Supreme Court discussed the AAIDD's eleventh edition in *Hall*. *See Hall*, 134 S. Ct. at 1995. Similarly, like the

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[8] AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010).

Supreme Court in *Atkins*, *Briseno*'s analysis of intellectual disability considered the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), but since the *Atkins* and *Briseno* decisions, that manual has been superseded by the Fifth Edition, the DSM-5.[9] Rather than rely exclusively on the older scientific standards as this Court does today by continuing to apply an unmodified *Briseno* standard, this Court, like the Supreme Court in *Hall*, should, at a minimum, consider how the developments in the scientific standards during the past ten years might affect a judicial determination of intellectual disability.[10] *See Hall*, 134 S. Ct. at 2000 (explaining that, as compared to the DSM-IV, the DSM-5 places less emphasis on a person's IQ score than on the person's adaptive deficits). Because the medical community's

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[9] American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

[10] The substance of Section 591.003(13) remains as it was when *Briseno* was decided, although some of the terminology has changed, such as the term "mental retardation," which is now called "intellectual disability." *See* TEX. HEALTH & SAFETY CODE § 591.003(13), (7-a) ("'Intellectual Disability' means significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."); § 591.003(1) ("'Adaptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group."); § 591.003(20) ("'Subaverage general intellectual functioning' refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used."). The changes to the terminology were enacted by House Bill 1481 in 2011 in order to make the language referring to intellectual disabilities more respectful, but that legislation did not alter the substance of the definitions. *See* Tex. H.B. 1481, 82nd Leg., R.S. (2011).

views on the assessment of intellectual disability have changed in the last decade, the Supreme Court in *Hall* considered the current consensus of the scientific community in deciding the merits of that case. This Court should follow suit. As I explain below, the DSM-5 has several important differences from the DSM-IV with respect to the proof of intellectual disability, and these differences require this Court to modify the *Briseno* standard.

(B) Prong One: A Strict Cutoff Based on IQ Scores is Contrary to Current Medical Standards

This Court's majority opinion is contrary to the *Hall* Court's holding that an intellectual-disability claim should not be rejected by treating an IQ score as a precise number because the medical community does not quantify intellectual disability at an IQ score of seventy or below, nor does it treat an IQ score in the marginal range as being dispositive of an intellectual-disability diagnosis. *Hall*, 134 S. Ct. at 1998-2001. In explaining its finding that applicant had significant limitations in intellectual functioning, the habeas court made finding of fact number 78, in which it noted that IQ tests are not able or even designed to produce a single and precise figure, but rather are best conceptualized as a range of scores. The habeas court's finding that IQ test results should be treated as a range rather than as a precise number is consistent with the *Hall* Court's holding, and, therefore, this finding should be upheld by this Court. *See id.*

Whereas the Court in *Atkins* had considered the views of the medical community in the then-current DSM-IV, the Court in *Hall* considered the current DSM-5 in deciding that Florida's strict IQ cutoff was unconstitutional. *Compare Atkins*, 536 U.S. at 308 n. 3 (discussing DSM-IV), *with Hall*, 134 S. Ct. at 2000

(relying on the DSM-5 and quoting it for the proposition that "'IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks'"). Furthermore, as support for its conclusion that it was "not sound to view a single factor as dispositive of a conjunctive and interrelated assessment" of intellectual disability, and citing to the DSM-5, the Supreme Court observed that "a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Hall*, 134 S. Ct. at 1995, 2001. By applying a standard error of measurement but then using a strict cutoff based on IQ scores, this Court's majority opinion is effectuating the same type of standard that the Supreme Court rejected in *Hall* as constitutionally unacceptable.

Although analysis of IQ has not been completely removed from the diagnostic determination of intellectual disability in the DSM-5, its importance has been greatly reduced as compared to the DSM-IV. *See id.* Under the DSM-5, it is possible for a person with an IQ test result higher than 75 to be characterized as intellectually disabled depending on his adaptive functioning, as compared to the DSM-IV, which specifies that the 75 score would be dispositive within the margin of error. *Id.* Here, according to this Court's majority opinion, taking into account the standard error of measurement and ignoring the Flynn effect, the two tests it finds acceptable produced an IQ score range from 69-83, and this, therefore, would constitute an adequate basis for rejecting

applicant's claim.[11] For the limited purposes of this discussion, I will accept the majority opinion's conclusion that the only two valid scores are applicant's 1973 WISC score and his 1989 WAIS-R score, which are higher than the other six scores. According to the DSM-5, applicant's IQ score alone should not be enough to reject his claim because it is necessary to also consider his adaptive functioning in conjunction with his IQ score. Given the reasoning of *Hall*, which requires a court to at least consult current medical standards in reaching a determination of intellectual disability, I disagree with this Court's majority opinion as to prong one of its intellectual-disability analysis that holds that applicant's IQ scores ranging from 69-83, part of which fall below 70, are alone an independent reason for finding that he is not intellectually disabled.

I also disagree with this Court's majority opinion for the two additional reasons, as explained below, that (1) it cherry picks applicant's two higher IQ scores and (2) it disregards the other scores: the OLMAT (77), Slosson (57), WAIS-R (abbreviated) (71), 2013 RCPM (85), the WAIS-IV (59), and the derived scores on the Bender Gestalt (67) and Goodenough (72). First, I disagree with the majority opinion that it is proper to

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[11] *See* maj. op., at 71 ("taking into account the standard error of measurement, applicant's score range on the WISC is between 73 and 83"; taken altogether, there is "no reason to think that applicant's obtained IQ score of 78 on the WISC is inaccurate or does not fairly represent his borderline intelligence during the developmental stage"); *see also id.* at 71-72 ("the score that applicant obtained on the 1989 WAIS-R supports the conclusion that his WISC score accurately and fairly represented his intellectual functioning during the developmental period"; his score range on the WAIS-R "is between 69 and 79").

dismiss the WAIS-IV, the most recent and comprehensive test on which applicant scored a 59 in 2013, a score impliedly determined to be credible by the habeas court. The majority opinion's rationale for rejecting that test is that applicant put forth suboptimal effort because the State's expert, Compton, indicated that applicant had a motive to do poorly and gave suboptimal effort. The habeas court, however, impliedly found the evidence that applicant gave suboptimal effort not to be persuasive. The State's expert's testimony that applicant gave suboptimal effort was contradicted by a defense expert, Greenspan, who testified that it is difficult to interpret effort-test results as to intellectually-disabled individuals because of problems validating those tests, and such tests thus have reduced significance in this context. Furthermore, even accepting the majority opinion's analysis that the other scores are less reliable because they were based on noncomprehensive instruments, they were neuropsychological tests rather than IQ tests, and they used the now-disfavored concept of mental age to arrive at the score, these scores should not be disregarded in their entirety in that they provide some evidence that supports the habeas court's findings that applicant had significant limitations in intellectual functioning. These other tests also provide evidence that supports the habeas court's findings that applicant did not give suboptimal effort in taking his most recent IQ test and that the State's expert's testimony on suboptimal effort lacked credibility. In short, even if the five other tests showing applicant as intellectually disabled do not stand alone as definitive evidence of intellectual disability, they, in conjunction, support the habeas court's fact finding that applicant's most recent IQ score is reflective of limitations in intellectual

functioning. In the absence of the testimony from Dr. Compton, which was implicitly found not credible by the habeas court with respect to suboptimal effort, applicant's most recent IQ test places him easily within the range of IQ scores that show intellectual disability. And, although this Court is the ultimate fact finder, the credibility determinations regarding which expert was most believable should be left to the habeas court as the original fact finder in this case.

Second, even if the majority opinion is correct in disregarding the applicant's most recent IQ score, and even if it is correct that this Court should rely solely on the WISC administered at age 13 that produced a score of 78 and the WAIS-R at age 30 that produced a score of 74, these scores, under the current medical standards, would still require this Court to examine whether applicant has adaptive deficits.[12] Taking into account the standard error of measurement and ignoring the Flynn effect, these two tests produce a range from 69-83. A diagnosis of intellectual disability is often indicated by an IQ score of 70 or below, but, as the Supreme Court held in *Hall*, 70 is not a strict cutoff point beyond which the possibility of intellectual disability is foreclosed. *Hall*, 134 S. Ct. at 1996. Even disregarding most of the evidence that the habeas court found credible and relying only on applicant's two highest scores, the score range supports a finding that applicant has established the first prong.

Although I conclude that the record appears to support the habeas court's determination that applicant has significantly subaverage general intellectual

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[12] When the test took place, the administrator made a slight error that caused this test score to originally be recorded as 74. The error has since been acknowledged, so we need only concern ourselves with the correct score.

functioning based on reliable IQ scores, I would not definitively decide that question today in order to permit the original fact finder to apply the correct modified standard to the evidence in this case.

(C) Prong Two: Unscientific Criteria Should Not Be Used to Assess Adaptive Deficits

The *Briseno* analysis of the adaptive-deficits prong makes Texas's determination of intellectual disability unconstitutional because, as observed by the Supreme Court in *Atkins* and *Hall*, any such assessment should be informed by the current diagnostic standards employed by the medical community. More specifically, in light of the Supreme Court's analysis on this subject, the majority opinion's continued application of the *Briseno* standard is constitutionally unacceptable because it relies on an unscientific assessment that (1) considers adaptive deficits based on the DSM-IV alone, (2) includes a comparison to the fictional character Lennie; and (3) considers seven evidentiary factors that are inapplicable in this context.

1. Adaptive Deficits Should Not Be Based on the DSM-IV Alone

The *Briseno* Court's decision to place a legal standard into the medical criteria for establishing adaptive deficits produced an unscientific standard that is inconsistent with the requirement that any standard be informed by current medical criteria. The DSM-5 altered the "adaptive functioning requirement" by describing it as how well a person meets community standards of personal independence and social responsibility in comparison to others of similar age and sociocultural background. *See* American Psychiatric Ass'n, *DSM-5 Intellectual Disability Fact Sheet* (2013); *see also* Shelly Yeatts, Texas District and

County Attorneys Association, *Significant Changes from the DSM-IV to the DSM-5* (November 2013). The DSM-5 relies more on adaptive functioning than the DSM-IV did, both for diagnosing intellectual disability and for determining its level of severity. *Id.*; *see also* Walter Kaufmann, *Intellectual Disabilities's DSM-5 Debut*, SPECTRUM NEWS 2013. In terms of diagnosis, the DSM-5 assesses the level of adaptive functioning in three domains: social, conceptual, and practical skills,[13] and it requires at least one domain that includes several skill areas of adaptive functioning versus two or more skill areas in the DSM-IV. In short, the type of analysis for establishing adaptive functioning is different in the DSM-IV than in the DSM-5, and this Court should modify the *Briseno* test to conform to the current scientific standards. I, therefore, disagree with this Court's majority opinion as to prong two of its intellectual-disability analysis that rejects applicant's claim based on his failure to prove adaptive deficits under a standard that is no longer employed by the scientific community in assessing intellectual-disability claims.

Furthermore as to prong two, the DSM-5 appears to more readily acknowledge that people with intellectual disabilities are often able to perform basic life functions and tasks, such as holding jobs, driving cars,

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[13] *See APA Intellectual Disability Fact Sheet*, at 1. The social skills domain considers the awareness of others' experiences, empathy, interpersonal communication skills, friendship abilities, social judgment, and self-regulation, among others. The conceptual domain considers language, reading, writing, math, reasoning, knowledge, and memory, among others, used to solve problems. The practical domain considers self management across life settings, including personal care, job responsibilities, money management, recreation, managing one's behavior, and organizing school and work tasks, among others.

and supporting their families. *See Wiley v. Epps*, 625 F.3d 199, 203, 204 (5th Cir. 2010). People with intellectual disabilities may be able to (1) read, write, and perform some rudimentary math; (2) have friends; (3) maintain personal hygiene; (4) drive a car on occasion; (5) appropriately groom themselves and possess a driver's license; and (6) maintain a relationship.[14] None of these skills or abilities are necessarily inconsistent with intellectual disability. This Court's majority opinion, however, gives heavy weight to applicant's ability to perform some of the functions listed above even though the current scientific community would discount that type of behavior as dispositive evidence of adaptive functioning. I disagree with this Court's majority opinion as to prong two of its intellectual disability analysis that rejects applicant's claim based on his failure to prove adaptive deficits by giving great weight to evidence that is no longer credited by the scientific community in assessing intellectual disability claims.

Additionally as to proof of adaptive functioning or adaptive deficits, unlike the DSM-IV that permitted evidence about a defendant's behavior in prison, the DSM-V recommends that this assessment be determined outside of a prison setting. *Wiley*, 625 F.3d at 203, 204. The DSM-5 recognizes that people on death row operate within a world where choices are extremely limited, even for such basic matters as when to wake up and when to go to bed, what to eat, when to shower or change clothes, and other life basics. The

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[14] *See* John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY RTS. J. 393, 408 (2014).

DSM-5, therefore, discounts much of the evidence about a defendant's ability to function inside a prison setting. This Court's majority opinion, however, gives heavy weight to applicant's ability to function and work while on death row even though the current scientific standards in the DSM-5 would discount that type of behavior as evidence of adaptive functioning, because ordinarily the kinds of tasks that are assigned can be performed by someone who is intellectually disabled.

But, perhaps, not all evidence obtained during a defendant's prison stay is immaterial to the question of his adaptive deficits or functioning. Any decision to consider a defendant's prison behavior must be examined closely for details that might show learned behavior from the great repetition of an event or limited choices. For example, here, this Court's majority opinion considers applicant's use of commissary slips in prison to suggest that he does not have adaptive deficits because he could understand the math involved to manage his commissary. The majority opinion relies on the testimony of Jerry LeBlanc, a prison official who testified that applicant appeared to understand his commissary order and that applicant did not receive any assistance from LeBlanc. But it is apparent that the habeas court was unpersuaded that LeBlanc's testimony demonstrated applicant's lack of adaptive deficits. In finding of fact number 169, the habeas court found that applicant had significant difficulty in filling out his commissary slips and in negotiating the $85 spending limit. The habeas court further mentioned that its examination of the commissary records revealed "numerous mathematical and spelling errors" on the slips as well as commissary requests adding up to significantly more than the spending limit on fifteen out of twenty-

four slips in evidence. The habeas court found that the repeated mathematical errors and consistent excessive ordering combined with the simple, unchanging spending limit reflected a lack of understanding of these basic concepts. I disagree with this Court's majority opinion's analysis as to prong two that rejects applicant's claim based on his purported failure to prove adaptive deficits by considering his general ability to function on death row when much of that type of evidence is no longer considered probative by the scientific community in assessing intellectual disability claims due to the repetitive nature of the events and limited choices, and, to the extent that certain jail-house evidence can be probative, the habeas court found that the State's evidence was lacking in credibility and unpersuasive.

I also note that the majority opinion decides that applicant does not have adaptive deficits, in part, by considering *pro se* documents that he presented for his writ application. However, applicant's counsel presented evidence that applicant may have had help in preparing those documents. Again, the habeas court appears to have credited the applicant's evidence more than the State's evidence. Ordinarily, this Court, as the ultimate fact finder, defers to the habeas court, the original fact finder, on matters involving credibility of the evidence.

The majority opinion makes many observations that conflict with the habeas court's assessment of adaptive deficits, but it does so by applying the *Briseno* test that I conclude does not comply with the Supreme Court's requirements in *Hall*. Although I disagree with some of the majority opinion's analysis with respect to the lack of evidence of adaptive deficits, I would not decide this question here but would instead remand for the

habeas court to reconsider the evidence under a new modified test that considers current medical standards, and, as explained below, omits the Lennie standard and the seven evidentiary considerations.

2. The Second Prong on Adaptive Deficits Should Not Include a Comparison to Fictional Character

Even if the literary reference to Lennie was simply an attempt to write colorfully gone awry, its inclusion in *Briseno* suggests that people who are severely or profoundly intellectually disabled would not be subject to the death penalty; that people who are mildly intellectually disabled would be subject to the death penalty; and that people who are moderately intellectually disabled may, depending on the circumstances, be subject to the death penalty. *See Briseno*, 135 S.W.3d at 6. The *Briseno* Court discussed the then-existing DSM-IV four subcategories for mental retardation: "mildly mentally retarded, moderately mentally retarded, severely mentally retarded, and profoundly mentally retarded." *Id.* This Court then stated,

> The functioning level of those who are mildly mentally retarded is likely to improve with supplemental social services and assistance. It is thus understandable that those in the mental health profession should define mental retardation broadly to provide an adequate safety net for those who are at the margin and might well become mentally-unimpaired citizens if given additional social services support. We, however, must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from

> the death penalty. Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? . . . As a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature.

Id. In referring to Lennie as someone who might be exempt from execution whereas others unlike him would not be, this Court's opinion has been read as implying or holding that those individuals who are less than severely or profoundly intellectually disabled would not be exempt from execution. Under that standard, Texas law creates a blanket rule that makes it constitutionally permissible to execute someone who the DSM-IV would catagorize as mildly or moderately intellectually disabled. I conclude that, to the extent that the Texas standard categorically permits the execution of a mildly or moderately intellectually disabled person, even one whose intellectual disability is such that he has a "diminished capacit[y] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," then the Texas standard is unconstitutional. *See Atkins*, 536 U.S. at 318 (discussing the justification for holding that the federal Constitution prohibits the execution of intellectually disabled people). I would hold that the

Lennie standard does not meet the requirements of the federal Constitution because it potentially permits the execution of a mildly or moderately intellectually disabled offender who meets the legal definition of *Atkins*, and it categorically limits the protections of the Eighth Amendment to those offenders determined to be severely or profoundly intellectually disabled. I conclude that any standard set forth by Texas must at least contemplate the possibility that someone categorized as mildly or moderately intellectually disabled in the DSM-IV might have the specific type of adaptive deficits to make him ineligible for execution according to the Supreme Court's reasoning in *Atkins*. Therefore, I would set forth a standard that does not include any reference to a fictional character as a basis of comparison for deciding whether a person is exempt from the death penalty by reason of his intellectual disability.

3. Adaptive Deficits Should Not Include the Seven *Briseno* Evidentiary Considerations

The *Briseno* Court mentions seven evidentiary considerations that could be considered as part of an assessment of a defendant's adaptive deficits, but it did so without any supporting authority. This Court stated,

> [S]ome other evidentiary factors which factfinders . . . might also focus upon in weighing evidence as indicative of mental retardation:
>
> - Did those who knew the person best during the developmental stage — his family, friends, teachers, employers, authorities—think he was mentally retarded at the time, and, if so, act in accordance with that determination?

- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8.

These seven questions do not belong in any determination about a defendant's adaptive deficits. Although they have similarity to some of the inquiries about adaptive deficits, these seven questions have a different focus from a determination on adaptive deficits in that they weigh a defendant's positives against his negatives. The weighing of positives against negatives is unlike a scientific determination of adaptive deficits, which looks solely at a person's inability to perform certain functions. Because it improperly conflated the legal standard with the medical standard in its decision permitting the injection of seven unscientific questions to evaluate adaptive deficits, the *Briseno* standard erroneously applies modern scientific principles. I, therefore,

would hold that the seven questions have no application to a decision about adaptive deficits.[15]

Rather than conflate a legal policy standard with a medical standard, this Court should limit the first step in its analysis to a determination whether the medical community would consider an individual to be intellectually disabled. If a defendant fails to meet this test, then his claim likewise fails. But if a defendant can show that the medical community would consider him to be intellectually disabled, then the Court would progress to the second step.

II. Step Two: Determination of the Legal Standard Whether There Is a National Consensus Against the Death Penalty For Someone at the Applicant's Level of Intellectual Disability

I do not suggest that the type of information in the seven *Briseno* evidentiary considerations must be entirely excluded from any analysis of intellectual disability, but instead I would confine those kinds of questions to a second step in an analysis that occurs only after finding that a defendant is, according to prevailing medical/scientific standards, intellectually disabled. Furthermore, I would modify the seven questions so that they would more closely reflect the underlying rationale for disallowing the execution of certain intellectually disabled offenders.

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[15] Because my primary disputes with the majority opinion are with respect to the first two prongs, and because I believe this case must be remanded for the habeas court to reconsider the evidence under a revised standard for deciding intellectual-disability claims, I do not, at this juncture, include an analysis of the third prong with respect to whether applicant has proven the onset of any intellectual disability prior to age eighteen.

The second, third, and fifth *Briseno* questions are appropriately founded on the Supreme Court's *Atkins* opinion. The second question asking about whether the defendant can formulate plans or exhibits impulsive conduct, the third question about whether he is a leader or a follower, and the fifth question about whether his communication is coherent or irrational all target the reasons why the Supreme Court determined that the federal Constitution prohibits the execution of intellectually disabled people. The *Atkins* Court identified those reasons, observing that "[b]ecause of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." *See Atkins*, 536 U.S. at 318. The Court also noted that "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.* These three *Briseno* factors track the legal rationale underpinning *Atkins* and, I conclude, are appropriate considerations when deciding whether a person is legally exempt from the death penalty.

Turning to the remaining questions, the first and seventh factors may be appropriate if they are modified. The first question asks, "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at the time, and, if so, act in accordance with that determination?" One problem with this question is that it appears to invite individuals to give their subjective opinions comparing the defendant to a stereotype of how they believe an intellectually disabled person would appear or behave.

Although I conclude that it is appropriate to consider evidence by a defendant's family, friends, teachers, employers, authorities, and anyone else who the defendant had contact with during his developmental period, I conclude that the more appropriate inquiry should focus on those individuals' observations about the kinds of deficits and behaviors that made the defendant unlike his peers, what those deficits were, and how they were addressed.[16] *See Hall*, 134 S. Ct. at 1996 (factors that indicate whether the person "had deficits in adaptive functioning . . . include evidence of past performance, environment, and upbringing"). By targeting the evidence to specifically address observations of a defendant's adaptive deficits, the fact finder can decide whether the level and degree of those

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[16] In assessing adaptive functioning, clinicians focus on a variety of deficits. "AAIDD's classification manual emphasizes the actual impact of intellectual limitations on the individual's life: 'Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.' Among the tools available to clinicians in diagnosing adaptive deficits are standardized psychometric instruments known as adaptive behavior scales. Unlike IQ tests, these instruments are not administered to the person who is being evaluated, but rather focus on other sources of information, including information provided by teachers, family members, and others familiar with the individual's everyday functioning. Along with school and social service records and similar evidence, these may permit an evaluator to determine whether the reduced cognitive functioning measured by IQ tests constitutes a real-world disability in the individual's life. Since adaptive behavior inquiries in the context of a capital trial are, of necessity, retrospective in nature, a thorough individual, educational, and family history becomes essential." James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later–A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 388-89 (2014).

deficits amount to a conclusion of intellectual disability such that a defendant may not constitutionally be executed. The first *Briseno* question, therefore, may be appropriately considered if it is modified to target adaptive deficits.

The seventh *Briseno* question focuses on whether the defendant's offense required forethought, planning, and complex execution of purpose. That question could be of marginal relevance if the offense required those things but the defendant's particular role in the offense did not. A more appropriate question would align with the rationale underlying *Atkins* by asking whether the defendant's acts in the commission of the offense show that he had a diminished capacity to understand and process information, to communicate, to abstract from mistakes, to learn from experience, to engage in logical reasoning, to control impulses, to understand the reaction of others, and whether he was a follower rather than a leader (if the offense was committed by a group). *See Atkins*, 536 U.S. at 318. The seventh *Briseno* question, therefore, may be appropriately considered if it is modified to target the adaptive deficits of the defendant that may have been exhibited during the commission of the offense so as to permit a fact finder to determine whether the level and degree of his intellect warrants a legal exemption from the death penalty.

I also conclude that the remaining two questions are inappropriate and should be eliminated as irrelevant. These two questions focus on the rationality of an offender's response to external stimuli and on whether he can hide facts and lie effectively.[17] The Supreme

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[17] "A feature of adaptive behavior that causes some confusion is that the focus is exclusively on deficits and not on strengths. At first blush, the exclusive focus on deficiencies may seem

Court in *Atkins* did not specifically list either of these considerations as constituting reasons why executing the intellectually disabled is unconstitutional. *See Atkins*, 536 U.S. at 318. It is unclear how information about a defendant's response to external stimuli would assist anyone is deciding whether he is constitutionally ineligible for execution. Perhaps the question about a defendant's ability to lie effectively was intended to target his ability to understand and process information in that someone who can consistently maintain a lie without contradiction might have higher intellectual reasoning. But maintaining a lie seems to include a moral compass that is immaterial to whether someone has an intellectual deficit, and the other questions seem to better reveal whatever might be relevant from this question without its prejudicial component. I fail to see any sound reason why these two questions would be proper evidentiary considerations in determining whether a particular individual has demonstrated that he is ineligible for execution under the reasoning of *Atkins*.

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counterintuitive, but clinicians have long recognized that for almost all individuals with intellectual disability, functional weaknesses coexist with strengths, and there is no 'list' of things that no individual with intellectual disability can do. With the increased focus on adaptive deficits after *Hall*, there is a substantial risk that triers of fact may fall into the trap of relying on unfounded and inaccurate stereotypes about what people with intellectual disability can and cannot do. Courts will need to be particularly careful not to rely, either directly or indirectly, on such stereotypes." James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later–A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 388-89 (2014).

Some of these seven considerations, and perhaps other evidence, should be considered as part of a second step that is addressed only after a court has determined that a defendant has proven the three prongs in the AAIDD. The second step of an Eighth Amendment intellectual-disability analysis should focus on whether a defendant who has proven that he has an intellectual disability has also shown that, according to the reasoning of *Atkins*, the extent of his disability is such that it would constitute cruel and unusual punishment to execute him for capital murder. I would hold that only some of the seven *Briseno* factors may remain viable, and only to the extent that they provide information relevant to the legal determination whether the extent of a defendant's intellectual disability rises to the level that there is a national consensus against permitting him to be executed.

III. Conclusion

Because the habeas court's findings of fact and conclusions of law were premised on an attempt to apply parts and distinguish other parts of the *Briseno* standard, I would set forth a new modified standard for deciding intellectual disability claims and remand this case to the habeas court. I limit this dissenting opinion to voicing my concerns with the continued application of the *Briseno* standard, which I believe does not conform to the requirements of the federal Constitution, and to set forth some possibilities for a modified standard. I do not attempt to formulate a precise standard to replace the now-outdated *Briseno* standard. Any new or revised standard ultimately should be made by the Legislature, but until then, in the absence of statutory guidance, a new standard should be developed by a majority of the judges on this

Court, and taking into account the informed view of a consensus of the medical scientific community and the people of the State of Texas.

Filed: September 16, 2015

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APPENDIX B

IN THE 185 JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 314483-C

Ex Parte BOBBY JAMES MOORE,

Applicant

February 6, 2015

Addendum Findings of Fact and
Conclusions of Law on Claims 1-3

This court has previously disposed all other contested matter in the above referenced cause. As there was a factual issue evident the court ordered a hearing on the *Atkins v. Virginia*[1] issues of this claim. This Court, having considered the allegations contained in the instant Application for Writ of Habeas Corpus, all exhibits and testimony admitted at hearing, all subsequent documents admitted by agreed order, the trial court records and appellate records, and Respondent's Answer and its Supplemental Answer and exhibits submitted therewith, makes the following findings of fact and conclusions of law regarding Applicant Bobby Moore's allegation that he is a person with mental retardation:

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002)

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. The Applicant, Bobby James Moore, was formally charged by way of indictment May 13, 1980 in the 185th District Court in Harris County, Texas, with the offense of capital murder. (Clerk's Record Vol I-116)

2. Bobby Moore was convicted of capital murder and sentenced to death on July 15, 1980, after the jury answered the special issues. The jury convicted him as the shooter in a store robbery in which a clerk was shot to death. (CR I-116)

3. The original Writ of Habeas was received on August 8, 1983.

4. The Texas Court of Criminal Appeals affirmed Bobby Moore's murder conviction and sentence on direct appeal dated October, 10 1985. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985)

5. On August 10, 1999, The United States Court of Appeals for the Fifth Circuit granted Mr. Moore a new sentencing proceeding and the case was remanded to the trial court to either vacate his death sentence and impose a sentence less than death or conduct a new sentencing hearing. *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

6. The State chose to conduct a new sentencing hearing. Jury Selection began on January 9, 2001, and concluded on February 1, 2001.

7 Punishment proceedings commenced on February 6, 2001, and both sides rested and closed on February 12, 2001.

8. After hearing argument of counsel and receiving the trial court's instructions, the jury begin its deliberations on February 13, 2001 and ended on February 14, 2001 with special issues Number One and Two being answered on the affirmative and Special Issue Three (mitigation) in the negative.

9. The trial court thereafter sentenced Mr. Moore to death.

10. On March 30, 2001, Mr. Moore's motion for new trial was considered by the trial court and subsequently denied.

11. Application for post-conviction Writ of Habeas Corpus filed was filed on June 17, 2003.

12. Factual Supplement to Writ of Habeas Corpus was filed on November 14, 2011. An additional supplement was filed the week prior to the hearing.

13. On January 2nd and 3rd, a hearing for an Application for a Writ of Habeas Corpus was held before Hon. Susan Brown, Presiding Judge of the 185th District Court of Harris County,, 2014. Texas. This court ordered argument on findings for Thursday the 23rd of January

B. RISK FACTORS FOR MENTAL RETARDATION

14. Dr. Compton, the State's expert, noted that risk factors are an indication of mental retardation and that Mr. Moore had many risk factors present before the age of 18.

15. Etiology is conceptualized in the 11th edition of the AAIDD manual [2010 AAIDD MANUAL 58-62] as a multifactorial construct composed of four categories of risk factors that interact

across time, including across the life of the individual and across generations from parent to child.

16. The manual sets forth risk factors commonly associated with intellectual disability (mental retardation). The four categories of risk factors are: (1) biomedical: factors that relate to biologic processes, such as genetic disorders or nutrition; (2) social: factors that relate to social and family interaction, such as stimulation and adult responsiveness; (3) behavioral: factors that relate to potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse; and (4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills. [*Id.* at 126]

17. The second direction, which the manual sets forth, concerns the timing of the occurrence of causal factors according to whether these factors affect the parents of the person with ID, the person with ID, or both.

18. While the presence of risk factors does not guarantee that an individual has mental retardation, studies show that as many as 50 percent of the population of individuals with mental retardation have more than one causal risk factor. Further, mental retardation often reflects the cumulative or interactive effects of more than one risk factor. [*Id.* at 125] As the 2002 AAMR MANUAL emphasizes, "*The impairment of functioning that is present when an individual meets the criteria for a diagnosis of mental retardation usually reflects the*

presence of several risk factors that interact over time." [*Id.*]

19. However, it is important to note that the classification of an individual as intellectually disabled does not rely upon the identification of an etiology, for as the 2010 manual states: *"Even the most extensive and up-to-date genetic and biomedical testing will identify an etiology in less than half of all cases."*[2]

20. Due to the correlation between risk factors and mental retardation, it is relevant and material to determine whether Mr. Moore's history contains any of the risk factors for retardation identified by the AAIDD. Copious evidence from the family history witnesses in this case establishes that Mr. Moore was exposed to all four categories of risk factors and across all three time periods commonly associated with mental retardation. The presence of these risk factors lends further weight to this Court's finding of intellectual disability (mental retardation) in Mr. Moore's case.

1. PRENATAL

Biomedical

21. Chromosomal Disorders: The record reflects suspicion of Mr. Moore's mother [Marion Moore] and one sister possibly had an intellectual disability.

22. Poverty: Documents received from Mrs. Marion Moore[3] confirm what is consistently recalled

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[2] Page 59 and see also, table on page, Fact Stipp. 60 TAB A

[3] BOX 8: Letter from Universal Capital Mortgage (11/11/1974; Handwritten note from Financial Assistance Corporation

from the Moore family and their acquaintances; Mr. Moore was brought up within a severely impoverished environment. Food was scarce, beds were underprovided[4], rent and mortgage payments were always late, heating was often not available in the winter, clothes were shared and the family lived in some of the most impoverished areas across all of the southern states.

23. Domestic Violence: There are many reports of Ernest beating Marion. There is no evidence to indicate that he was physically aggressive to Marion while she was pregnant with Mr. Moore, but the possibility should not be excluded; Ernest had a track record for hitting women. Clara Jean Baker recalls that her father, Ernest, *"Knocked the breath out of his own mother."*[5]

Behavioral

24. Parental Alcohol Use: Mr. Moore's father Ernest Moore Junior was known to be suffering from severe alcoholism. Ernest died prematurely in 1997 aged just 64 years and his death certificate[6] indicates that alcohol use contributed to his death. This objective evidence is supported by accounts from members of the Moore family, their friends, and neighbors, of

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(11/21/1979) ; Letter from Mortgage Banque Inc (8/17/1976) ; Letter from Raymond G. Woodard (1/18/1977) ; Letter from Frost-Arnett Company (1/5/1981) TAB B

[4] Meeting with Bobby Moore 24th May 2000: pg 7546 7 TAB C

[5] Meeting with Moore family 03-16-00. pg 7645 TAB D

[6] BOX 8 TAB E

alcohol-induced rages and scenes of violence. It appears that Ernest was known to have a short temper and appeared to have started drinking from the early age of 13 or 14[7]. Larry Baker, who has known Mr. Moore since they were children, stated in his affidavit: "*We grew up in the same neighborhood. I saw Bobby's Father, Ernest Moore, and knew that Ernest suffered alcohol problems: Ernest would go on alcoholic binges and disappear for days. No one would ever know when or if Ernest would ever return*"[8] Clara Jean Baker stated: "*Bobby's father had alcohol problems... Bobby's father would go on alcoholic binges and would disappear for days on end.*"[9] Bobby's younger brother, Ronnie Moore, stated: "*My father was an abusive alcoholic and much of our poverty was due to him.*[10]" Lonnie Moore remembers that their father would come home drunk and they would find him lying drunk on the porch in the mornings. Some nights they would hear him coming down the street stumbling, falling and shouting / singing loud enough for the neighbors to hear also.[11]

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[7] Meeting with Ernest Junior Moore's family 03-25-00. BOX 17 pg.7637 TAB F

[8] Affidavit of Larry Baker BOX 12 TAB G

[9] Affidavit of Clara Jean Baker BOX 12 TAB G

[10] Affidavit of Ronnie Moore BOX 12 TAB G

[11] Meeting with Lonnie Moore 02-28-00 BOX 17 pg 7674 TAB H

25. Parental Smoking: Ernest Moore Junior's death certificate[12] indicates that tobacco use contributed to his death.

Lack of Preparation for Parenthood

26. It is evident that Mr. Moore's parents had no preparation for the rigors of parenthood. Mrs. Marion Moore never sought prenatal care while pregnant and stayed with Ernest Moore, even though he beat her regularly. Meanwhile, Ernest Moore continued to drink, even with a child on the way, and did not in any way reduce his violently drunken behavior towards his wife and, later, Mr. Moore.[13]

27. Ernest Moore would strike Mr. Moore with a closed fist or an extension cord,[14] *"he [Ernest] would put our head through his legs to keep us in position so when he chastise us, he have a extension cord and had welps on us when it was all over with."*[15]

Educational

28. Parental Cognitive Disability Without Supports: It appears quite likely that Bobby's mother, Marion Moore, may also be mentally retarded. His eldest sister Clara Jean and her husband Larry Baker believed that Marion had a traumatic childhood during which she was not afforded much love or guidance and they agreed with the interviewer that Marion may well be

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[12] BOX 8 TAB E

[13] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 10-11

[14] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 11, 13-15

[15] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 11, 13-15

retarded.[16] Marion's behavior is frequently recalled as being out-of-the-ordinary. According to the recollections of Clara Jean Baker, Marion responded to Ernest's violence towards her (see paragraphs 28-31, below) in a strange way which may well be indicative of mental retardation. Marion would not just sit or lie back and take it, but would further provoke Ernest into hitting her.[17] Marion held a deep distrust of doctors and medicine; upon being diagnosed with cancer of the uterus in 1976 believed that she was ill because of a 'Hoodoo Curse'[18]. She was mugged at a bus stop in February 2000 and although her purse was stolen, she retained her cards and social security number. Despite knowing this, and despite protestations from Clara Jean, Marion insisted on reporting to the bank and social security office that her cards had not been stolen. She was met with an appropriate degree of bemusement.[19]

PERINATAL

Biomedical

29. Neonatal Disorders: Mr. Moore believes that when he was first born, he was sick a lot and stayed very small when he was growing up because he was ill.[20] His mother, Marion, confirmed this and described a time when

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[16] Meeting with Moore Family 03-16-00 pg. 7644 TAB D

[17] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[18] Meeting with Moore Family 03-16-00 pg 7648 TAB D

[19] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[20] Meeting with BM 25th May 2000: pg 7551 TAB C

Bobby had just started to crawl, "*We thought we might lose him*"[21]. At this time Bobby was suffering from severe diarrhea and dehydration. His younger sister Colleen, whose intellectual capacity is believed to be similarly limited, was also suffering from the same condition. Marion remembers taking both children to the hospital where their heads were shaved in order for needles to be inserted into cranial veins[22] -- it is, however, unclear from the records what this disorder might have been.

2. POSTNATAL

Biomedical

30. Traumatic Brain Injury: Around the date of 16th December 1971, Mr. Moore was hit in the left eye by a brick, which was thrown through the window of his school bus.[23] [24] Mr. Moore was also hit in the head with a chain, "*he got hit with a chain across his head, in his eye, it was bleeding, his mouth was busted and they was trying to pull him off the bus.*"[25] The bus was carrying black students and tensions were high because Scroggins Elementary was a predominantly Hispanic school. Bobby received treatment for his injury from Dr. Burman[26] and it is

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[21] Meeting with Marion Moore 05/25/00 pg 7662 TAB I

[22] Meeting with Marion Moore 05/25/00 pg 7662 TAB I

[23] Meeting with BM of March 23, 2000. pg. 7526 TAB C

[24] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[25] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 40, 2-4

[26] Dr. Richard Burman's medical notes TAB J

highly possible that Bobby sustained a traumatic brain injury.

31. However, perhaps the most likely cause of a traumatic brain injury would be the very frequent beatings Mr. Moore received from his mother, father and brothers (see below).

32. Malnutrition: Due to the Moore family's extreme poverty, which was only exacerbated by Ernest Moore's alcoholism, Mr. Moore and his siblings would often go without eating. When they did eat it would be nutrient-poor staples such as rice, beans and cornbread.[27]

33. Between the ages of 5 and 6, Bobby only gained 1 lb.[28] -- a well-nourished child would normally gain 5 -- 7 lbs. per year. A medical report from 1965 -- when Bobby was only 6 - indicated that Bobby's nutritional status was poor[29]. By this point, Mr. Moore was about 6lbs underweight -- a very significant amount for a young growing boy. Mr. Moorer's younger brother, Ronnie Moore, recalled: *"There were nine children in our family. Bobby, like the rest of us, grew up in extreme poverty. I first remember us living in the Fifth Ward of Houston. When I was about eight or nine, we moved to the South Park area. There were many nights when we did not get to eat dinner because there just was not enough money to buy food. When we did eat it was usually something like pork-bones and corn bread and*

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[27] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[28] pg 000853 TAB J

[29] pg. 000868 TAB J

stuff like that. My mother called it food that stretched a long way.... One time when I was about three or four Bobby and my sister Colleen were so hungry because we did not have any food, that they ate out of a neighbors [sic] trash can. They both got real sick, I think they got ptomaine poisoning."[30] Later in his life, when Bobby was approximately 13-14 years old and frequently being thrown out of the house, he was denied food by his father, who would tell the family: *"If any son of a bitch feed him tonight that he was going to get out, too, he was going to get them first."*[31] [32] [33]

34. Toxic-Metabolic Disorders: In late 1959 or early 1960, the Moore family moved to the 5th Ward area of Houston, Texas. This area, and others that the family subsequently moved to were notorious; not just for the poverty and violence, but for being contaminated with very harmful industrial waste.

35. On the 26th January 1999, environmental investigators accused a ship-channel area plating company [Ware Electro Plating at 630 Boyles] of allowing cyanide to foul a drainage ditch in a residential neighborhood. Mr. Moore attended Scroggins Elementary School and would have to walk past Ware Electro Plating to get to and from school. *"In 1996 ... the Texas Natural Resources Conservation Commission*

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[30] Affidavit of Ronnie Moore TAB G

[31] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[32] Lonnie Moore Testimony 1-2-2014 volume 2 pg. 14. 7

[33] Larry Baker Testimony 1-2-2014 volume 2 pg. 105, 2

told Ware that dangerous levels of cyanide and cadmium had been found in drainage ditches around the company. Instead of paying the $500-a-barrel cost of disposing of the cyanide and cadmium safely, Walsh said (Sgt. Michael S. Walsh of the Houston Police Department) *the company simply let it drain into a ditch alongside the building. 'This is one of the worst sites I've seen for environmental violations,' Walsh said. 'They have a total disregard for public health. And I mean a total disregard' Stephanie Lopez, who lives not far away, was unhappy because her 10-year-old daughter attends Scroggins Elementary School on Boyles and walks past Ware Electro Plating going to and from class."*[34]

36. Later that same year, on March 8th 1999, Mayor Lee Brown inspected a cleanup of lead-contaminated soil in the fifth ward neighborhood. The Moore family lived in this neighborhood from 1959 until 1972. *"The Texas National Resource Conservation Commission identified 86 homes as having total lead concentrations in the soil of 500 parts per million, a potential health hazard to residents, especially children... The 86 homes are located near the closed Many Diversified Interests facility at 3618 Baer Street... The facility*

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[34] *"Authorities say plating company letting cyanide foul ditch / Firm located near a Ship Channel-area residential neighbourhood"* Houston Chronicle 01/27/99 Section A, Page 17; Edition: 3 Star. TAB K

operated as a steel casting company from 1926 to 1992"[35]

Social

37. Impaired Child-Caregiver Interaction: Marion Moore, Mr. Moore's mother, was rarely at home due to her being both a domestic (cleaner) and working in a day care center. Bobby's father tended to be either at work, drunk or with friends. Ernest was a construction worker and would work away from home for long periods of time. However, even when he worked locally, the family would not see him for several days after he had been paid because he would go on an alcoholic binge.[36] [37] As such, there was very little supervision of the children. When Bobby was still only a child, aged 14, he was thrown out of the family house and was never allowed to return: *"Bobby was forced to leave home when he was about fourteen. I remember that my father was beating on my mother, I was in the back room with the other younger kids. My mother would try and hide us in the back room when my father was on a rampage. I could hear the fighting in the other room. I heard Bobby tell my father to stop beating on my mother. My father started cursing Bobby out and told him to*

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[35] *"Mayor Brown Inspects Clean Up of Lead-Contaminated Soil From 86 Fifth Ward Homes"* Mayor's Office Home Page March 8, 1999 TAB K

[36] Affidavit of Larry Baker BOX 12 TAB G

[37] Anthony S. Haughton's interview with Bobby Moore 11-4-91 BOX 12 TAB C

get out of the way and then told him to get out of the house. Bobby never lived at home again."[38]

38. Family Poverty: Please see above

Behavioral

39. Child Abuse and Neglect: Mr. Moore's father, Ernest, physically terrorized the family but picked on Mr. Moore most of all.[39] *"He would beat Bobby with his fists, electrical extension cords, peeled tree branches, or anything else that came to hand. He very often left marks, welts, and other bruises. At the worst times Bobby was beaten daily, and a couple of times a week at best"*[40] Ronnie Moore recalls: *"I remember hearing Bobby screaming and crying for my dad to stop beating him, but it did not make a difference."*[41] Colleen D: McNese, Mr. Moore's younger sister, recalls: *"He [Ernest] would beat up on [Bobby] without any cause. He would beat Bobby with his fists, slap him across the face, and regularly used an extension cord to whip him with. He beat Bobby so bad with that cord that he still has the marks on his body.*[42]" Mr. Moore's mother, Marion, used to beat him just as hard as Ernest did. It appears that while Ernest would beat the family when he was drunk, it was Marion who would beat the children for disciplinary purposes: *"Mum was*

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[38] Affidavit of Ronnie Moore BOX 12 TAB G

[39] Affidavit of Colleen D. McNese TAB G

[40] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[41] Affidavit of Ronnie Moore TAB G

[42] Affidavit of Colleen D. McNese TAB G

really into discipline, she looked like she had no mercy, she did it to the boys most... she would tell them to take their shorts off... it felt like she was taking her frustrations out on them."[43] She would use an extension cord to whip the children and on one occasion, Mr. Moore remembers that blood from his back was spraying across the wall of the home with every lash of the cord.[44] Marion told an interviewer that: *"A child must really feel the whooping or it's not worth it because they will do it again*[45]*."* Mr. Moore's brothers, Jessie, Charles and Lonnie, would also beat him regularly when he was growing up. They too would hit him with things, often in the head: he was left bruised and injured from the many beatings they gave him.[46]

40. Domestic Violence: Colleen McNeese, Mr. Moore's younger sister, remembers that their father would frequently physically abuse their mother: *"He beat her one time with a broomstick. He had it on her neck and she was begging him because she couldn't hardly breathe."*[47]

41. Ronnie Moore, Mr. Moore's younger brother, recalled: *"He [Ernest] would get uncontrollably mad at the slightest little thing. When he got*

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[43] Meeting with Clara Jean Baker 05-27--00 pg 7654 TAB L

[44] Meeting with Bobby Moore March 23, 2000., pg 7526 TAB C

[45] Meeting with Marion Moore 05/27/00 pg 7664 TAB I

[46] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[47] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

mad at my mother he would beat her in front of us."[48]

42. Mr. Moore recalled that on one occasion he came home to find his father threatening his mother with a handgun - a .22 or .32 caliber pistol. He further recalls that shortly after his release from prison in July 1979 he returned to the family home to find his father threatening his mother with a knife.[49]

43. Clara Jean recalls memories from her childhood when, as well as the usual punching and slapping of Marion, she would see her father pin Marion down on the floor, or on the bed, with his body while Marion would be screaming.[50] It is possible that Clara Jean may have been unknowingly witnessing the rape of her mother by her father.

44. Clara Jean recalls another incident in which Marion and Ernest were fighting outside the house; Marion was in a ditch and Ernest was kicking her.[51]

45. A doctor's note from July 4th 1972, details injuries sustained to Marion after she *"fell down flight of stairs 3 days ago"*[52]. It is important to note that, at that time, there were no stairs in the Moore household.

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[48] Affidavit of Ronnie Moore TAB G

[49] Meeting with Bobby Moore February 11, 2000., pg 7523 TAB C

[50] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[51] Meeting, with Clara Jean Baker 05-27--00 pg 7653 TAB L

[52] Dr. Richard Burman's medical notes pg 4072 TAB U

46. Violence was pervasive, constant feature of family life in the Moore household. Clara Jean recalls that sometimes when her father came home drunk and fell asleep, Marion would hit him with a baseball bat.[53]

47. Just one sibling, Lonnie Moore, estimates to have personally witnessed between 50 and 100 instances of domestic violence.[54]

48. Social Deprivation: Social deprivation -- including the lack of a nonviolent surrounding community -- is a behavioral risk factor for mental retardation. This risk factor was present in Mr. Moore's young life as a result of the violence that pervaded the 5th Ward in Houston when he was a child.

49. Drug use: Drug use is a behavioral risk-factor for mental retardation. In 1971, when Mr. Moore was aged 11, he began to abuse drugs: sniffing glue and smoking marijuana.[55] By the time Mr. Moore was 15 or 16, he was taking more drugs.[56] [57]

Educational

50. Impaired Parenting: Ernest Moore had no interest in Mr. Moore's school work most of the time, *"I want to say there is not a interest or was not a concern because he didn't have education, so he couldn't realize what was good or what was bad.*

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[53] Meeting with Clara Jean Baker 05-27--00 pg 7653 TAB L

[54] Meeting with Lonnie Moore 02-28-00 pg 7674 TAB H

[55] Interview with BM 25th May 2000: pg 7552 TAB C

[56] Interview with BM 25th May 2000: pg 7552 TAB C

[57] Meeting BM October 10 2000: pg. 7623 TAB C

He didn't put interest in that."[58] Only when teachers from Mr. Moore's elementary school approached Ernest Moore about Mr. Moore's learning deficiencies did Ernest Moore a negative interest, *"And my dad would particularly get mad if someone from the school would come to the house to tell him that he needed some assistance and my dad, I remember, he ran the teacher away from the house. She only came because she had concerns trying to help Bobby and my dad wouldn't allow her to come in the house. So he never got the help that he really needed."*[59]

51. Inadequate special education services: Records from Mr. Moore's life indicate that those people involved in his education were keenly aware that Mr. Moore suffered from some form of condition; some believed it to be mental retardation, but others simply thought it was due to emotional issues. Mr. Moore was tested very frequently, more so than the average child, and as a result was sent to summer school and received various other extra-curricular supports.

52. The fifth assumption of the current AAIDD definition[60] states that *'With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve.'* Due to the consistency of Mr. Moore's IQ scores over a 20 year period, and supporting evidence as to the validity of these scores, it appears that whatever help the

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[58] Lonnie Moore Testimony 1-2-2014 volume 2 pg. 14, 22-25

[59] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 34, 4-10

[60] AAIDD pg. 7

education system did provide for Mr. Moore, it was simply inadequate.

53. Perhaps due to the nature of those times, and the fact that mental retardation was not as well understood as it is today, the teachers would tend to keep Mr. Moore occupied with menial activities such as drawing while the rest of the class continued with the curriculum.

54. Other teachers would simply ignore Mr. Moore, an out of sight, out of mind approach was used, "They didn't really try to help him anyway at school because they would sit him in the hallway, said that he was stupid because he didn't know how to read."[61]

55. Further, it appears from the records that, despite various scores consistently identifying his poor academic performance, Mr. Moore was only sent to a special summer school once.

56. When teachers from the elementary school actually did approach the Moore family to lend special assistance, the teachers were rebuked by Ernest Moore, *"...my dad came behind her and he wouldn't accept talking to her because he said Bobby is having -- he'd use the "stupid" word and he said that the school is aware of it, it's not like y'all trying to help him [Bobby] so don't keep bothering us, and he just slam the door. So at that time nobody else came back there."*[62]

57. **Inadequate Family Support**. The lack of family support in Mr. Moore's life is demonstrated by

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[61] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 35, 9-11

[62] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 61, 6-12

his family's inability to protect him from the violence of his parents and siblings, and their inability to advocate for better educational services while he struggled in school. Repeatedly, Mr. Moore was abandoned when he was faced with violence at the hands of Ernest Moore or deprivation through being forced onto the streets; and no family member ever inquired into why he was having so much trouble in school. Poverty, illiteracy, alcoholism, cognitive impairments and general ignorance likely diminished the family's ability to advocate for Mr. Moore.

C. THE GUIDING LEGAL STANDARD

58. In determining whether Mr. Moore has mental retardation, the Court has been guided by the clinical definitions of mental retardation developed by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA"). Each organization recognizes that mental retardation is a disability characterized by (l) "significantly subaverage" general intellectual functioning, (2) accompanied by "related" (AAMR) or "significant" (APA) limitations in adaptive functioning, (3) the onset of which occurs prior to the age of 18. AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010); APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)

59. In *Atkins v Virginia* 536 U. S. 304 (2002), the Supreme Court of the United States construed and applied the Eighth Amendment - prohibiting

cruel and unusual punishment - in light of our "*evolving standards of decency*", to conclude that the execution of mentally retarded persons is excessive punishment; and the Constitution "*places a substantive restriction on the State's power to take the life*" of a mentally retarded offender. *Ford*, 477 U.S. at 405.

60. The Supreme Court, in *Atkins*, noted that neither of the two justifications for the death penalty, recognized in *Gregg v Georgia*, 428 U.S. 153, 183 (1976) -- retribution, and deterrence of capital crimes by prospective offenders -- may apply to mentally retarded offenders. It was stated that, "*unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.*" *Enmund*, 458 U.S. at 798.

61. Retribution -- "'the interest in seeing that the offender gets his 'just deserts'" -- is a principle which the Court in *Atkins* recognized as necessarily depending upon the culpability of the offender. The court recognized the narrowing jurisprudence in which only the most deserving of execution are put to death. As such, and in light of their deficiencies which diminish their personal culpability, the Court ruled that exclusion for the mentally retarded was appropriate.

62. As the Supreme Court eminently noted, it is these very same cognitive and behavioral impairments that make the mentally retarded less morally culpable, which also make it less

likely that they can process information regarding the possibility of execution as a penalty and, as a result, are less able to regulate their conduct based upon that information.

63. The deficits of the mentally retarded -- a diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control responses -- are the very same traits displayed by young children; and, as with children, they are less able to grasp the morality and legality of their actions, and less able to arrest their impulses, despite being aware of the punishment, which of itself will be but a distant and unconnected threat.

64. In the Supreme Court's proportionality review, in light of evolving moral standards, it was noted that *'to the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.'* The Supreme Court reiterated their prior approach in *Ford v Wainwright*, with regard to insanity, *"we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."* 477 U.S. 399, 416-417.

65. In *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), the Court of Criminal Appeals held that Texas should adopt the *"AAMR three part definition of mental retardation"* in the "Persons With Mental Retardation Act" (citing *Ex parte Tennard*, 960 S.W.2d 57, 60 (Tex. Crim. App. 1997) and HEALTH & SAFETY CODE §§ 591.003(13) & (16)). The Court then applied

that definition in determining whether the applicant presented sufficient evidence of mental retardation.

66. As our standards of decency evolve, so too do the standards of psychological diagnosis. The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). In 2010, the AAIDD published the 11th edition of their manual, which began to refer to mental retardation as intellectual disability. It should be stressed however, that the term 'Intellectual Disability' covers the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type, and duration of the disability; every individual who is or was eligible for a diagnosis of mental retardation is eligible for a diagnosis of Intellectual Disability.

67. The Eleventh edition manual from the AAIDD provides the following definition of Intellectual Disability.

"Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18. The following five assumptions are essential to the application of this definition:

1. *Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.*

2. *Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.*

3. *Within an individual, limitations often coexist with strengths.*

4. *An important purpose of describing limitations is to develop a profile of needed supports*

5. *With appropriate personalized supports over a sustained period, the life functioning of the person with intellectual disability generally will improve."*

AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010)

68. Each component of the definition of mental retardation requires additional explanation:

69. **Limitations in Intellectual Functioning.** Whereas several jurisdictions have interpreted their appropriate statutes as intending for there to be a strict IQ score cutoff of 70 (notably, Florida[63], Kentucky[64] and Tennessee[65]), Texas is noted for its absence of any legislation which implements the Atkins decision and there is therefore no legislative bright-line for IQ scores. Instead it relies on the ruling in *Ex parte*

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[63] *Jones v State*, 966 So.2d 319, 329 (Fla. 2007) -- however, the US Supreme Court is due to decide whether such a bright-line cut off is constitutional and in accordance with *Atkins v Virignia*, 536 U.S. 304 n.3 (2002)

[64] *Bowling v Commonwealth*, 163 S.W.3d 361, 374-75 (Ky. 2005)

[65] *Howell v State*, 151 S.W.3d 450, 458 (Tenn. 2004)

Briseño in which the Texas Court of Criminal Appeals (TCCA) wisely decided to follow the AAMR definition of mental retardation: *"Until the Texas Legislature provides an alternative statutory definition of "mental retardation" for use in capital sentencing, we will follow the AAMR or section 591.003(13) [Texas Health and Safety Code] criteria in addressing Atkins mental retardation claims.*[66]*"* *Ex parte Briseño*,135 S.W.3d 1, 8 (Tex. Crim. App. 2004) (as discussed above, the AAMR has changed its name to the AAIDD however, the definition for the disorder is largely identical; any changes in the definition reflect the current accepted scientific definition as compiled by the leading authorities on intellectual disabilities).

70. As recently as 2008, the Texas Court of Criminal Appeals has reaffirmed the position they took in *Briseno*, with the case of *Williams v State, "We have adopted the American Association on Mental Retardation (AAMR) definition of mental retardation for Atkins claims presented in Texas death penalty cases."* *Williams v. Texas*, 270 S.W.3d 113 (Tex. Crim. App. 2008)[67]

71. In 2010, the Texas federal district court in *Maldonado v Thaler* reaffirmed their wise rejection of 70 as cutoff and stated *"While Texas has not established 70 as a bright-line standard, it has not expressly adopted another score as the*

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[66] *Ex parte Briseno*,135 S.W.3d 1, 8 (Tex. Crim. App. 2004)

[67] *Williams v. State*, 270 S.W. 3d 112, 113 (Tex. Crim. App. 2008)

retardation threshold either.[68]" *Maldonadao v. Thaler*, 662 F. Supp. 2d 684, No. H-07-2984 (S.D. Tex., Sept. 24, 2009) (slip copy at 36). aff'd., 625f. 3d 229 (5th Cir. 2010).

72. Noting also, the Supreme Court's acknowledgement of the AAMR definition of intellectual function in Atkins that "*mild mental retardation is typically used to describe people with an IQ level of 50-55 to* ***approximately*** *70.*[69]" (Emphasis added), this Court is satisfied that the reasonable interpretation of *Atkins* and *Briseno*, requires the presentation of evidence that identifies the applicant's intellectual deficiencies as defined by the then AAMR, which is now the AAIDD.

73. The AAIDD provides the requirement that for a positive diagnosis of mental retardation, an IQ score should be "*approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations.*[70]"

74. The APA's DSM-IV-TR[71] requires "*significantly sub average intellectual functioning*" and states that, "*it is possible to diagnose Mental Retardation in individuals with IQs between 70*

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[68] *Maldonadao v. Thaler*, 662 F. Supp. 2d 684. No. H-07-2984 (S.D. Tex., Sept. 24, 2009) (slip copy at 36), aff'd., 625f. 3d 229 (5th Cir. 2010).

[69] *Atkins v Virginia*, 536 U.S. 304 n.3 (2002)

[70] AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010)

[71] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)

and 75 who exhibit significant deficits in adaptive behavior."

75. The APA's DSM-V raises it to 75 (an IQ of 75 places one at approximately the 5th percentile).

76. On a recently normed and widely accepted test -- such as the Weschler Scales -- administered under perfect conditions, the average IQ score for the population would be approximately 100 and one standard deviation is 15. Therefore, a score of two-standard deviations below the mean would equate to an IQ score of **approximately** 70.

The Standard Error of Measurement (SEM)

77. The AAIDD's instruction to consider *'the standard error of measurement*[72]*'* is a reference to the fact that any IQ score is subject to variability, as a function of a number of potential sources of error and, thus, a variation in scores may or may not represent the individual's actual or true level of intellectual functioning. The standard error of measurement is used to quantify this variability and provide a stated confidence interval within which the person's true score falls. The AAIDD manual states that *'for well-standardized measures of general intellectual functioning, the standard error of measurement is approximately 3-5 points*[73]*.'* The manual further advocates, *'understanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision*

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[72] AAIDD ref to consider the SEM

[73] AAIDD pg 36

concerning a diagnosis of ID (Intellectual Disability) *that is based, in part, on significant limitations in intellectual functioning. Both the AAIDD and the American Psychiatric Association (2000) support the best practice of reporting an IQ score with an associated confidence interval.'* The APA's DSM-IV-TR states that *"It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g. a Weschler IQ of 70 is considered to represent a range of 65-75)".*

78. **This Court joins with the inventors of IQ tests such as the Weschler, in recognizing that IQ tests are not designed to - nor are they able to - produce a single and precise figure; but rather it is appreciated that an IQ test result is best conceptualized as a range of scores.**

79. This Court has recognized the TCCA's past use and acceptance of the standard error of measurement (SEM) in *Ex parte Hearn*, in which they cited with approval *Wilson v Quarterman, "There is "a measurement error of approximately 5 points in assessing IQ," which may vary from instrument to instrument. [8] Id. Thus, any score could actually represent a score that is five points higher or five points lower than the actual IQ." Ex parte Hearn*, 310 S.W.3d 424, 426-27 (Tex.Crim.App. 2010) *Wilson v. Quarterman*, 2009 WL 900807 *4 (E.D.Tex. Mar. 31, 2009)

80. In *Lizcano v State* (Unpublished), The State contended on appeal that the standard error of measurement was plus or minus five points and

therefore five points should be added to the applicant's IQ scores. However, the TCCA held that *'The State's contention[s] have very little merit... the State presented no evidence showing why the standard error of measure of five points should be added to the appellant's score rather than subtracted from it or even ignored, particularly in light of the testimony from Dr. Compton that the multiple scores below 70 increased her confidence in the validity of the scores.'*

81. This court is duly observant of the TCCA's line of reasoning in *Lizcano* and further, notes the wisdom of its reasoning:

    a. Firstly, it serves to uphold the Atkins direction that States should develop an *appropriate* way to enforce the restriction on executing the mentally retarded;

    b. Secondly, it recognizes the slippery slope which a contrary decision might have created -- namely that there would be a presumption against an applicant's status as mentally retarded when they have IQ scores above 66, rather than the accepted Atkins and AAIDD definitions;

    c. Thirdly, it is in line with directions from the AAMR manual -- which was available to the Supreme Court in Atkins -- which states, *'Where the existence of intellectual limitations is uncertain or unequivocal, the decision should be made that would result in services that*

would be most advantageous to the individual.[74]'

d. **Fourthly, the principle behind the *Atkins* decision is to prevent the cruel and unusual punishment of those with mental retardation. The standard error of measurement represents the scope of the range of IQ scores within which the Defendant's IQ score resides. The TCCA was right to appreciate that to execute all those with an IQ score anywhere within the range of SEM, would create an unacceptable risk of the unconstitutional killing of those suffering from mental retardation.**

The Flynn Effect

82. **The AAID manual also indicates the importance of including other psychometric statistical adjustments; which may have a profound effect upon the applicant's true IQ score. Of particular significance is the Flynn Effect; of which the manual states the following:**

> *"The Flynn Effect refers to the observation (Flynn, 1984*[75]*) that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time... Flynn reported that mean IQ increases about 0.33 points per year"*[76]

83. **The manual advocates that best practice requires recognition of a potential Flynn Effect**

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[74] **AAMR Definition Manual (9th Edition) at 14.**

[75] **Flynn 1984 TAB A**

[76] **AA1DD pg 37 TAB A**

when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score.

84. This Court however, recognizes that same truth which was stated in *Hall v Quarterman*,[77]: Federal courts cannot commit the ultimate decision of mental retardation to the experts alone. The Flynn Effect was neither considered by the Supreme Court in Atkins, nor by the Texas Court of Criminal Appeals in *Briseno*. The Court, in *Neal v State*, described the Flynn Effect as *'an unexamined scientific concept,* [78]' but it also said, *'this court has never specifically addressed the validity of the Flynn Effect. Nor will we attempt to do so now.' Neal v. State*, 256 S.W.3d 273 (Tex. Crim. App. 2008)

85. However, at this time, the Flynn Effect had been examined by other courts. Most notable amongst them is an authority no less than the US Navy-Marine Corps Court of Criminal Appeals, in the case of *United States v Parker*,[79] The Court held *'We adopt the definition of mental retardation from the American Association on Intellectual and Developmental Disabilities as it applies to the imposition of the death penalty in the Navy and Marine Corps. In determining whether an offender meets this definition, standardized IQ scores scaled by the SEM (standard error of measurement) and the*

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[77] *Neal v. State*, 256 S.W.3d 273 (Tex. Crim. App. 2008)

[78] By which it meant that the scientific concept had not been examined by a court.

[79] *United States v. Parker*, 65 MJ 626,629-30 (N-M. Ct. Crim. App. 2007)

Flynn effect will be considered, along with evidence of the offender's adaptive functioning ability, and onset of the mental retardation before the age of 18.' United States v. Parker, 65 M.J. 626, 629-30 (N-M. Ct. Crim. App. 2007)

86. Further, all of the experts who contributed to this hearing -- both for the defense and the prosecution -- were guided in their assessments by their acceptance of the Flynn Effect as a vital tool in the diagnosis of mental retardation.

87. In light of the aforementioned, this Court will present the applicant's evidence of limitations in intellectual functioning, in three formats: as unadulterated scores; adjusted to give a bracket of scores, guided by the SEM; and adjusted to take into account of the Flynn effect at the rate of 0.33 points per year -- as advocated by the AAIDD manual.

Practice Effects

88. The AAIDD manual provides professional guidance on the practice effect: *"The practice effect refers to gains in IQ scores on test of intelligence that result from a person being retested on the same instrument... established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence"*[80]

89. Lichtenberger and Kaufman (2006)[81] state that *"Practice effects on Wechsler's scales tend to be*

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[80] AAIDD pg 38

[81] Assessing Adolescent and Adult Intelligence (2006 edition)

profound, particularly on the performance scale ...The impact of retesting on test performance, whether using the WAIS-III, WAIS-R other Wechsler scales, or similar tests, needs to be internalized by researchers and clinicians alike. Researchers should also be aware of the routine and expected gains of about 2 ½ points in V-IQ [Verbal] for all ages between 16 and 89 years. They should also internalize the relatively large gain on P-IQ [Performance] for ages 16-54 (about 8 to 8 ½ points)."

90. **Limitations in Adaptive Functioning:** With respect to adaptive functioning, the AAIDD definition requires *"performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without ID that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills"*. The APA definition requires that the limitations in adaptive functioning encompass at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health, safety, functional academics, leisure, and work.

91. The Texas Court of Criminal Appeals in *Briseno*, provided seven *'other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder.'*

92. This Court is satisfied that it was the intention of the Texas Court of Criminal Appeal (TCCA) to provide guidance to those factfinders who would be presented with similar facts as in *Briseno*; where evidence had been presented that the applicant suffered from Anti-Social Personality Disorder rather than Mental Retardation. This Court is encouraged by a recent ruling from the TCCA in which it held, *'In addition to demonstrating that one has subaverage intellectual functioning and significant limitations in adaptive functioning, he or she must demonstrate that the two are linked -- the adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder. To help distinguish the two this court has set forth evidentiary factors that "fact-finders in the criminal trial might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder." Briseno, 135 S. W.3d at 8' (Ex parte Yokamon Laneal Hearn, 2010*[82])

93. This Court is further satisfied that it may treat the *Briseno* factors as discretionary, by the acceptance of such a position by the Fifth circuit in *Moore v Quaterman*.[83]

94. This Court has not found it necessary to directly consider these extra *Briseno* factors, as at no point during the case's 34 year history has the prosecution -- nor indeed any other interested

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[82] *Ex parte Hearn*, 310 S.W.3d 424, 426-27 (Tex. Crim. App. 2010) Wilson v. Quarterman, 2009 WL 900807 *4 (E.D.Tex. Mar. 31, 2009)

[83] *Moore v. Quarterman*, 454 F.3d 484, 498 (5th Cir.2006)

party -- ever alleged that Mr. Moore suffers from Anti-Social Personality Disorder. This Court must therefore assess Mr. Moore's adaptive deficits based entirely upon the stipulations provided in the AAIDD manual.

95. Nevertheless, despite this Court not explicitly considering the *Briseno* factors, our thorough investigation of facts based upon the AAIDD definition did consider evidence which implicated, and indeed answered, many of the *Briseno* factors.

96. **Age of Onset.** Third, with respect to the requirement that the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of 18, it is not required that there be a diagnosis of mental retardation before the person's eighteenth birthday. Rather, it is necessary only that the limitations in adaptive functioning be apparent before the age of 18, that IQ testing sometime during the person's life reliably establish an IQ of 75 or below,[84] and that there be no

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[84] The consensus among mental health professionals is that a full-scale IQ of 70 or below satisfies the requirement of significant limitations in intellectual functioning. IQ tests are considered not to be perfectly accurate, however, because of "variations in test performance, examiner's behavior, or other undetermined factors." 2002 AAMR MANUAL, at 57. Accordingly, a "standard error of measurement" must be taken into account in interpreting the IQ score obtained on any test. *Id.* The standard error of measurement is the range of IQ scores within which there is a high level of confidence that a person's "true" IQ resides. *Id.* Thus, obtained IQ scores up to 75 can satisfy the first component of the definition of mental retardation, for the true IQ score of a person who obtains a score of 75 is within the range of 70-80.

intervening reason, such as a traumatic head injury, for the person's IQ to have diminished since the age of eighteen.

97. Accordingly, the Court has dutifully relied on the 11th edition of the AAIDD definition of mental retardation to determine whether Mr. Moore has mental retardation.

D. DIAGNOSTIC EXPERTS

98. **Dr. Richard Garnett** has thirty-five years of professional experience working with people with mental retardation. During that time he has served as a psychologist, diagnostician, counselor, therapist, juvenile probation officer, and a consultant and trainer within the field. He holds Bachelors, Masters and Doctorate degrees in Psychology and has served on committees and Boards of Directors for local, state, and national organizations that serve or represent people with mental retardation. He is certified and licensed as a psychologist in the State of Texas. Dr. Garnett is a past president of the Texas Association on Mental Retardation, and a current member of the Mental Retardation Public Advisory Council for the Texas Department of MHMR. He was recently re-appointed by Governor Perry to the Board of Directors for the Interagency Council on Autism and Pervasive Developmental Disorders. He has interacted with hundreds of people with

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See Atkins v. Virginia, 536 U.S. at 309 ("an IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition").

mental retardation, and has evaluated a number of defendants for mental retardation.

99. **Dr. Robert P. Borda** is a clinical neuropsychologist who has been in private practice since 1985. He holds a bachelor's degree from Princeton, a masters and a doctorate in Physiology from Baylor College of Medicine, and a second doctorate in Psychology from the University of Houston. He is certified and licensed as a psychologist in the State of Texas. Dr. Borda specializes in the administration of a battery of tests to people who are thought to have a mental or emotional impairment in order to determine whether the results are suggestive of neurological or psychiatric disorders. In addition to his private practice in clinical neuropsychology, Dr. Borda has also served as an expert witness for the Social Security Administration (SSA) disability claims which have been appealed. He testifies as a medical expert in the area of mental disorders, and frequently will be asked to determine if the claimant meets the criteria for mental retardation which have been established by the SSA. Dr. Borda is a member of the American Psychological Association and the National Academy of Neuropsychology, and was one of the founding members of the Houston Neuropsychological Society. He has been certified by the American Board of Professional Disability Consultants.

100. **Dr. Stephen Greenspan** is a retired professor from the University of Connecticut where he was professor of educational psychology; and he now has a clinical appointment at the University of Colorado, in the department of

psychiatry; and he also has a consulting practice around mental retardation and particularly in forensic settings such as this. Dr. Greenspan has a PhD in developmental psychology from the University of Rochester and a postdoctoral fellowship in mental retardation and developmental disabilities from UCLA Neuropsychiatric Institute in the medical school. He has held a number of academic and research positions, specifically at: George Peabody College for Teachers of Vanderbilt University, the Boys Town Center for the Study of Youth Development and the University of Nebraska, the University of Connecticut (where he remains Emeritus Professor of Educational Psychology) and the University of Colorado (where he is Clinical Professor of Psychiatry). Dr. Greenspan has also been published numerous times in the area of mental retardation, particularly around diagnostic issues in an Atkins case setting. Dr. Greenspan has co-authored four chapters of the American Association for Intellectual and Developmental Disorders (AAIDD) handbook titled *Determining Intellectual Disability for the Courts: Focus on Capital Cases*. He is also in the process having a paper published in the Journal Current Opinion in Psychiatry. It was an invited paper on the DSM-V and the paper's main focus is issues of diagnosing intellectual disability. Dr. Greenspan is also coeditor of a book titled, *What is Mental Retardation*, which is widely cited.

101. **Dr Shawanda Williams-Anderson** is neuropsychologist who specializes in Traumatic Brain Injuries and brain anomalies. Dr. Anderson

earned her bachelor's degree from Dillard University in New Orleans and also earned her master's degree from Northwestern State University. Dr. Anderson earned her doctorate in clinical psychology from Jackson State University. She has also taught at Prairie View A&M University for four years and then proceeded to work for the Mental Health Mental Retardation Authority of Harris County. Dr. Anderson is currently in private practice, in which her primary focus is Neuropsychology with adolescents, children, and the geriatric population. She is an expert in administering tests for diagnosing traumatic brain injuries.

102. **Dr Kristi Compton** is a clinical and forensic psychologist. Dr. Compton earned her M.A. and Ph.D. in clinical psychology from Wichita State University. She has been licensed to practice for 14 years in Kansas and in Texas. She has experience working with inmates at the El Dorado Correctional Facility (Maximum Security Unit) in Kansas. Presently she has a private practice in Dallas in clinical and forensic psychology. Dr. Compton specializes in mental state of the time of the offense evaluations, competency to stand trial, diminished capacity and sex offender risk assessment. She has been an expert witness over 70 times and has performed of 3,000 forensic evaluations. Dr. Compton also currently teaches forensic psychology at the University of Texas-Dallas. She has been published in the *Journal of Prevention and Intervention in the Community*, the *Journal of Drug Education*, and *Development and Psychopathology*. She is a member of the

American Psychological Association and Texas Psychological Association, as well as a board member of Dallas Challenge.

E. THE DETERMINATION OF MR. MOORE'S INTELLECTUAL FUNCTIONING

103. Mr. Moore's IQ scores establish that he has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning.

104. From 1971 through 1989, Mr. Moore completed a total of seven tests of intellectual ability, several of which were administered by licensed professional psychologists.

105. In 1971, Mr. Moore obtained an IQ score of 77 on the OTIS-LENNON MENTAL ABILITIES TEST[85] [86].

106. In 1972 the Houston Independent School District (HISD) administered the SLOSSON INTELLIGENCE FOR CHILDREN on Mr. Moore and he was evaluated to have an **IQ of just 57** and a mental age of only 7.5 years -- despite being 13.1 years old.[87]

107. In 1973, Mr. Moore was administered a battery of tests by Marcelle Tucker, N.Ed., Consultant. Mr. Tucker reported that Mr. Moore obtained the following WECHSLER INTELLIGENCE SCALE FOR CHILDREN (WISC) scores:

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[85] ELEMENTARY TEST RECORD pg 000864 TAB J

[86] Iowa Test of Basic Skills: pg 000850 TAB J

[87] ELEMENTARY TEST RECORD pg 000864 TAB J

Verbal Scale IQ:	77 (borderline range)
Performance Scale IQ:	83 (dull normal range)
Full Scale IQ:	78 (borderline range)

108. As part of the test battery, Mr. Moore was administered a BENDER VISUAL MOTOR GESTALT TEST which reported his mental age as 8 years, 11 months. By dividing his mental age by his chronological age (13 years, 3 months) Dr. Garnett was able to estimate Mr. Moore's IQ to be **67**.

109. The final test in the battery was the GOODENOUGH DRAW-A-MAN TEST. It is reported that Mr. Moore was predicted to have a mental age of 9 years and 6 months. Using the same calculation as above, Dr. Garnett was able to predict Mr. Moore's IQ to be **72**.

110. In 1984 a psychological evaluation was conducted on Mr. Moore, by the unit psychologist, George B Wheat, at the request of the Psychological Screening Committee *'to assist in evaluating this death row inmate for work capable status.'* Mr. Wheat reports that *'his* [Mr. Moore's] *responses were appropriate to his 9th grade educational level and indicated IQ of 71'*. As part of his conclusion, Mr. Wheat again makes a specific reference to Mr. Moore's intelligence level: *'Considering inmate Moore's background, intellectual functioning, and' current Death Row status, he has adjusted guile well.'*

111. In 1989, Dr. Majors conducted intelligence screening on Mr. Moore using an abbreviated form of the WECHSLER ADULT INTELLIGENCE

SCALE -- REVISED (WAIS-R). Dr. Majors reported an IQ score of 71 and estimated that Mr. Moore fell within the Borderline retarded range. The following day, Mr. Moore was given the Full-Scale WAIS-R and obtained the following scores:

Verbal Scale IQ:	74
Performance Scale IQ:	76
Full Scale IQ:	74

112. Dr. Majors committed an error in scoring on the Digit Span subtest of the WAIS-R. He reported a raw score of 7, and then incorrectly put a scaled score of 5, when the correct scaled score should be 4. The correction of this error means that the scaled score for Verbal Tests is now 32, rather than 33. With reference to the WAIS-R manual, the accurate full scale score should actually be one point lower, which equates to a full scale IQ score of 73.

113. The full scale IQ score is likely to be affected by practice effects from the test administered one day prior. The accepted adjustment to account for practice effects is discussed in more detail above -- paragraphs 48 and 49.

114. According to the information in paragraphs 48 and 59, one might reasonably have expected the Mr. Moore's scores to have increased by even more than two points; however, due to the substantial deficit in his intellectual functioning, it appears that he was unable to learn fast enough to increase his IQ score further, the following day.

115. In 2013, Dr. Compton conducted intelligence screening on Mr. Moore using the WECHSLER ADULT INTELLIGENCE SCALE-FOURTH EDITION (WAIS-IV). Dr. Compton reported an IQ score of **59**, which falls within the mentally retarded range. Mr. Moore obtained the following scale scores on the WAIS-IV:

Verbal Comprehension:	58 (Extremely Low)
Perceptual Reasoning:	73 (Borderline)
Working Memory:	66 (Extremely Low)
Processing Speed:	62 (Extremely Low)
Full Scale I.Q.:	59 (Extremely Low)

116. **Unadulterated Mean**: For the purposes of obtaining an average IQ score, the score from the abbreviated version of the 1989 WAIS-R was not included in the calculation as it measured the exact same sub-sets as the full-scale WAIS-R which was administered the following day. Therefore, the mean IQ score, calculated from Mr. Moore's six IQ scores is **70.66**

117. **Consideration of the Standard Error of Measurement:** This Court can be 95% confident that Mr. Moore's IQ scores fall within the following ranges of each test:

Otis-Lennon Mental Abilities Test:	72 – 82
Slosson Intelligence Test for Children:	52 – 62
WISC:	73 – 83
Bender Visual Motor Gestalt Test:	62 – 72
Goodenough Draw-A-Man:	67 – 77
WAIS-R:	68 – 78
WAIS-IV	56 – 64

118. **Flynn-Adjusted Scores**: It is important to be aware of the date at which the test was published and the date at which the test was administered in order to make the necessary adjustments for the Flynn effect -- as explained in paragraphs 47, 48, & 49 above. As an example of the calculation that the Court conducted: the Slosson test was published in 1964 and administered in 1972; to adjust for the Flynn effect, the proper calculation takes account of an increase in IQ of 0.33 points per year. Therefore: 57 (8 x 0.33) = **54.36**

119. This Court has assumed that each IQ test administered was the most up to date test available at the time; if it were not then the Flynn effect would be significantly more pronounced.

Test	Date Published	Date Administered	Flynn-Adjusted IQ	Flynn-Adjusted SEM
Otis-Lennon Mental Abilities Test	4th Edition published 1967	1971	75.68	70.68 - 80.68
Slosson Intelligence Test for Children	SIT-1 published 1964	1972	54.36	49.36 - 59.36
WISC	The test would have been the original 1949 version as the revised version was not published until 1974.	1973	70.08	65.08 - 75.08
Bender Visual Motor Gestalt Test	Would have used the 1938 edition as the second edition was not released until 2003	1973	55.45	50.45 60.45
Goodenough Draw-A-Man	Revised edition published in 1963	1973	67.7	62.7 72.7
WAIS-R	Published in 1981	1989	71.36	64.36 - 74.36
WAIS-IV	Published in 2008	2013	57	52 - 62

120. The mean Flynn-adjusted IQ score is **64.52** +/- 5.

121. **Dr. Garnett's Assessment of Mr. Moore's Intellectual Functioning**. Dr Garnett reviewed documents reflecting the academic, behavioral and professional records for Mr. Moore, along with reports and records from the Juvenile Probation Department, the Texas Department of Criminal Justice, Court transcripts and medical, psychological and educational resources. He conducted the review in June, 2003, in order to determine whether there was sufficient evidence to support a motion for a hearing to determine whether Mr. Moore might meet the criteria for mental retardation as defined by current psychological theory.

122. Dr. Garnett noted that Mr. Moore's records report a number of IQ scores, which are the same as listed above. He explicitly challenges the validity of the Otis-Lennon Mental Abilities test which was administered to Mr. Moore in 1971. Dr. Garnett references the fact, that records from this time indicate that Bobby's reading ability fell within the 2nd percentile -- and was a full two years below the level expected for a child of Bobby's age. Dr. Garnett, notes that: *"The test* [Otis-Lennon Mental Abilities] *is a group paper-and-pencil test of general mental abilities which requires one to read the test and answer the questions. Due to the ongoing evidence of his inability to read, this score is questionable as to its validity*[88]*."*

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[88] TAB V

123. Dr. Garnett indicates that the WAIS-R tests, administered to Mr. Moore in 1989 by the Texas Department of Corrections and Justice, further underscored deficits in Mr. Moore's intellectual and mental processes.

124. Dr. Garnett concludes his section on Mr. Moore's intellectual functioning by stating that: *"It is clear that the preponderance of the indicators particularly when combined with Mr. Moore's academic record indicates substantive limitations in learning and progressing during the developmental period. Those indicators also clearly establish a pattern of significant deficits in intellectual functioning."*

125. **Dr. Borda's Assessment of Mr. Moore's Intellectual Functioning**. In 1993, Dr. Borda testified at Bobby Moore's retrial. Before giving evidence to the court, Dr. Borda had the opportunity to look at the following records: Records from the H.I.S.D. (Houston Independent Schools District); records from Hartman Middle School; records from the Texas Department of Corrections.

126. With reference to Mr. Moore's results from the WAIS-R test administered in 1989 by the TDCJ, Dr. Borda states, *"All of his scores are very uniformly within the borderline to retarded range."* He equates Mr. Moore's IQ score to a mental age of around 14 years -- Mr. Moore was 30 years old at the time of the test.

127. When asked whether Mr. Moore's IQ could potentially be within the retarded range. Dr. Borda responds by saying, *"I think there is a good possibility."*

128. Dr. Borda also made reference to the consistency of Mr. Moore's IQ scores, *"His test scores have not really differed significantly from those determined when he was in school before he was incarcerated."*

129. Based on the mental age estimates obtained from tests administered to Mr. Moore in 1973, Dr. Borda estimated that Mr. Moore's IQ in sixth grade could actually have been as low as **66**:

"This estimate is based on the average 'mental age' found in various tests done on Bobby in sixth grade, which equals 105 months. Dr. Borda then divided that number by Bobby's chronological age which gave Dr. Borda a possible IQ of 66 which, not surprisingly, is well within the retarded range."[89]

130. Despite the above statements from Dr. Borda, at the time he did not consider Mr. Moore to fulfill the clinical requirements of a diagnosis as mentally retarded. Instead, he believed that physical abuse, neglect and substance abuse may have affected his mental .status at the time of the incident[90].

131. Dr. Borda has since had the chance to review a significantly more extensive collection of documents concerning Mr. Moore. They are broadly the same documents which Dr. Garnett used to conduct his review. **After reviewing these documents, Dr. Borda expressed his clinical opinion that Mr. Moore's deficits**

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[89] Memo from Kristi Franklin Hyatt's meeting with Dr. Robert P Borda pg 5863 TAB M

[90] Memorandum April 13, 1993. TAB M

satisfy both the AAIDD and DSM-IV criteria for a diagnosis of mental retardation / intellectual disability.

132. Dr. Borda met with Mr. Moore in December 2013 and administered a function of higher frontal lobe test. It is a front lobe test in which the doctor places 50 tinkertoys on the table in front of the patient or applicant or claimant and the instructions are very simple. The test directs one to "make something." The patient can take as long as they want but the patient has at least ten minutes. This is an unstructured test designed to test motor visual skills, spatial appreciation, three-dimensional understandings and shapes, visual acuity and general intelligence. It also tests one's ability to plan ahead. A score below 7 generally equates with very poor likelihood of gainful employment and poor ability to live independently. Mr. Moore achieved a score of 1, the lowest score Dr. Borda has ever recorded.

133. Practice effects would be minimal for Mr. Moore as it had been many years since he was tested.

134. **Dr. Greenspan's Assessment of Mr. Moore's Intellectual Functioning.**

a. Flynn Effect The Flynn effect absolutely should be applied, not just if a test is ten years old but even if it's a brand-new test. The date a test is published, it's actually two years out of date in terms of the norms because there's about an average of a two-year period between the norming process, which is rather extensive, and then the publication process,

which is also about two years, so that every test is out of date the day it's published and a Flynn Effect should always be applied. When corrected for Flynn Effect, the scores that Mr. Moore received were 70 and 71. So that would be within the range of the DSM-IV and well within the range under DSM-V.

b. Standard Error of Measurement the standard error, as Dr. Borda pointed out, is 5 points standard of error. So that means any score of under 75 would qualify.

c. Consistency of Scores Mr. Moore has never tested anywhere near the average range. Mr. Moore would have had every incentive to test as high as possible as a child.

135. **Dr Williams-Anderson's Assessment of Mr Moore's Intellectual Functioning.**

Past IQ

a. Mr. Moore consistently scored in the deficit range, even when his first formal testing did not occur until he was 13 years old (1973), which is about the same time he left school.

b. If tested when deficits were first apparent (approximately age of 6/1st grade), his IQ would very likely have been below the reported standard score of 70.

c. In 1989 Mr. Moore obtained a full scale IQ of 71. This is consistent with his previous scores, suggesting that time and experience while incarcerated did not bring about new learning for Mr. Moore.

d. Current: Dr. Williams-Anderson tested and evaluated Mr. Moore for a period of 11/22/2013 to 12/19/2013.

B. Mini-Metal Status Exam (MMSE)

C. Rey Complex Figure Test (RCFT)

D. Symbol Digit Modalities Test (SDMT)

E. Trails A&B

F. Hooper Visual Organization Test (HVOT)

G. Controlled Oral Word Association (COWA)

H. California Verbal Learning Test-II (CVLT-II)

I. Delis-Kaplan Executive Functioning System (DKEFS)

J. Wide Range Achievement Test-4th edition (WRAT-4)-Math Subtest

K. Wechsler Adult Intelligence Test-IV WAIS-IV-Math-subtest

e. Test findings from the current evaluation indicated slowed processing speed, difficulty with reasoning and judgment, and deficits in verbal ability that cannot be solely attributable to a limited fund of knowledge.

f. The severity and characterization of the head trauma received by Mr. Moore as a child likely worsened intellectual deficits.

g. On the first of three sessions that took place at the Polunksy Unit on 11/22/2013, which consisted of mostly neuropsychological tests, Dr. Williams-Anderson found is that Mr. Moore's processing speed was slowed, although

he had intact memory, and just from observation and speaking with him for about an hour and a half, she noticed that there were some possible deficits in language and processing speed. On formal tests there were also problems with reasoning and judgment.

h. Dr. Williams-Anderson further explained at the hearing on 1/3/2014, that processing speed is how fast the brain fires. This is the area where she saw the most deficits: "Mr. Moore's processing speed fell in what we call a deficit range, low. Mr. Moore's T score was a 25 that I have listed here, where 50 is the mean and the standard deviation is 10. So. 40 would be low average and then 30 would be low and then he's 25. So he's more than two standard deviations below the mean".

i. Dr. Williams-Anderson found that Mr. Moore had some difficulty with verbal fluency and word-finding. Mr. Moore's language scores if corrected for his lack of education and his grade attainment, his score is then at the 11th percentile and in the law average range.

j. In the executive function tests that Dr. Williams-Anderson administered Mr. Moore's scores fell in the deficient range, and are indicative of deficits that would require formal interventions.

k. In Dr. Williams-Anderson's mathematical tests Mr. Moore demonstrated an ability to perform simple addition. Yet on the WAIS-IV, his scores fell within the 4th percentile and is indicative of moderately impaired ability. On the WRAT-4 Mr. Moore's score is the

equivalent of a third grade level of achievement. That score is classified as falling into the moderate to severe range when compared to the normative sample.

136. **Dr. Compton**

a. Dr. Compton met with Mr. Moore on 1/1/2014, and administered a Wechsler Adult Intelligence Scale, Fourth Edition; it's the most current one, up to date. It was released in 2008. She also gave Mr. Moore him selected subtests of what's called the Wechsler Memory Scales, Fourth Edition.

b. Dr. Compton also administered what is called the Test of Memory Malingering, which is defined as an effort test, and Mr. Moore was administered the Wide Range Achievement Test, Fourth Edition. Then she administered the Texas Functional Living Scales, which is an adaptive functioning measure.

c. Mr. Moore scored a standard score of 59 on the WAIS-IV, which was then Flynn adjusted to 57. This is consistent with Mr. Moore's Slossen score that was achieve at age 13.

F. THE ASSESSMENT OF MR. MOORE'S ADAPTIVE BEHAVIOR

137. According to the AAIDD, limitations in adaptive behavior can be determined by using standardized tests that are normed on the general population, which includes people with and without mental retardation. The AAIDD manual also advocates assessment through other sources of adaptive behavior information such as, *'direct observation, review of school*

records, medical records, and previous psychological evaluations; or interviews with individuals who know the person and have had the opportunity to observe the person in the community but may not be able to provide a comprehensive report regarding the individual's adaptive behavior in order to complete a standardized adaptive behavior scale.' 2010 edition of the AAMR MANUAL. [2010 AAIDD MANUAL at 48]

138. A "significant" limitation is established by a score of two standard deviations below the mean in one of the three adaptive-behavior skill areas described in the 2010 edition of the AAMR MANUAL. [2010 AAIDD MANUAL at 43]

139. The Court also finds as follows:

The first adaptive behavior skill-area is conceptual.

140. Mr. Moore has the following deficits in the conceptual area:

141. **Language.** Mr. Moore, as a child, was quite apparently very different from other children.

a. He didn't know how to communicate with people[91], and when he talked, his severe speech impediment was very obvious[92].

b. Mr. Moore's younger sister, Colleen McNeese, recalls how their father, Ernest, would often beat Bobby because he wouldn't talk: *"He would call Bobby's name and Bobby just stand and look at him. And sometimes he just didn't*

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[91] Interview with BM TAB C

[92] Interview with Clara Jean Baker TAB L

understand what he was saying to him so he didn't know how to respond."[93]

c. This is corroborated by Mr Moore's cousin, Parvena Williams, who remembers that Mr Moore was *"quiet"* and that *"His dad was always cruel to him for his poor grades and slow speech."*[94]

d. Mr. Moore's childhood friend, Larry Baker, stated, *"Bobby could not follow simple instructions...He had trouble verbally with people."*[95]

e. Indeed, Mr. Moore's only friend at school was an elder boy who was both deaf and dumb.[96]

142. **Reading and writing**. Throughout Mr. Moore's schooling he was kept separate from the rest of the class because he couldn't keep up with the work.

a. Instead of doing reading, he was allowed to draw pictures instead.[97]

b. Mr Moore's cousin, Parvena, states that *"In third grade I did all of Bobby's schoolwork... He really could not read when we were in 3rd grade."*[98]

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[93] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[94] Parvena Williams Affidavit

[95] Larry Baker Affidavit

[96] Interview with BM TAB C

[97] Interview with BM TAB C

[98] Parvena Williams Affidavit

c. Mr. Moore's younger brother, Lonnie Moore, also remembers that Mr. Moore *"Could not do his own schoolwork"* and *"Bobby could not read the sports page"*[99]

d. Mr. Moore's elder brother, Jonny B Moore, remembers that their father would tell Mr. Moore that he (Mr. Moore) couldn't read and that he was stupid[100].

e. It seems that it was because of Mr. Moore's slowness and his inability to read or write, that his father would pick on him by threatening him and beating him more than any of the other children: *"Bobby was always slow in school and my dad would always pick on him about that. He would constantly yell at Bobby that he was dumb or stupid."*[101]

f. Mr. Moore recalls that he was a slow learner who *"could not read or write when he left school."*[102]

143. Academics in general. As discussed in the above paragraph, teaching staff who came into contact with Mr. Moore noticed that he was much slower than the other children. According to Colleen: *"They're [the teachers] always talking to each other about it, him, in the halls*

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[99] Lonnie Moore Affidavit

[100] Meeting with Jonny B Moore 05-28-00. pg. 7687 TAB Q

[101] Affidavit of Colleen D. McNese TAB G

[102] Interview with Bobby Moore TAB C

talking, and they were asking if he was retarded."[103]

144. In 1966, he was assessed with the Metropolitan Readiness Test and was found to be functioning at the 9th percentile nationally.[104] Further results that same year confirmed Mr. Moore's below average intellectual functioning. When he was given the Draw-A-Man test, results indicated that he was *"immature"* compared to his peers.

145. Mr. Moore failed first grade twice[105]. During the repeated year, comments on his student records show that he was below average in his ability to respond *"promptly and willingly"* to directions and it is indicated that he was not self-reliant. Further, Mr. Moore had a *"below average ability to discipline himself"* and was below average in how *"attentive"* he is.[106]

146. In 1968, despite having failed first grade twice, Mr. Moore was socially promoted to second grade, in order to keep him with children of a similar age[107]. His grade card indicates that he still lacked self-discipline and had below average attention[108].

147. In 1969 the trend continued and Mr. Moore failed second grade and is socially promoted

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[103] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[104] ELEMENTARY TEST RECORD pg 000864 TAB J

[105] Houston Public Schools Elementary pg. 000862 TAB J

[106] Elementary School Report Card pg 000789 TAB J

[107] Houston Public Schools Elementary pg. 000862 TAB J

[108] Elementary School Report Card pg 000789 TAB J

again to third grade[109]. Teacher's remarks from that year indicated that Mr. Moore attended a special education program in the summer, was recommended for 'IPP LRP' and was also referred to a counselor[110]. An Iowa Test of Basic Skills puts his battery composite score within the 12th percentile nationally[111].

148. In 1970, Mr. Moore failed 3rd grade and is once again socially promoted to fourth grade[112]. The results of an Iowa Test of Basic Skills, administered in 1971, confirmed that his intellectual functioning is significantly below average: his scores placed him within the 5th percentile nationally[113]. The provided Grade Equivalent is third grade, and when one considers that Bobby was held back a year, one can see that he was performing at a level **two years** below his chronological age.

149. In 1971, Mr. Moore fails 4th grade but is socially promoted to 5th grade[114], after having spent 22 days at a summer-school. That same year, when Mr. Moore was now aged 12, he obtained an IQ score of 77 on the Otis-Lennon Mental Abilities Test[115] [116].

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[109] Houston Public Schools Elementary pg. 000862 TAB J

[110] Houston Public Schools Elementary pg. 000862 TAB J

[111] IOWA TEST OF BASIC SKILLS pg. 000875 TAB J

[112] Houston Public Schools Elementary pg. 000862 TAB J

[113] Iowa Test of Basic Skills: pg 000850 TAB J

[114] Houston Public. Schools Elementary pg. 000862 TAB J

[115] ELEMENTARY TEST RECORD pg 000864 TAB J

[116] Iowa Test of Basic Skills: pg 000850 TAB J

150. In 1972, notes from the Houston Independent School District (HISD) indicate that Mr. Moore *"needs special placement"*[117]. His Iowa Test of Basic Skills score followed the past trend and placed him in the 9th percentile nationally.[118] That same year the HISD administered the Slosson Intelligence Test for Children on Mr. Moore and he was evaluated to have an IQ of just 57 and a mental age of only 7.5 years -- despite being 13.1 years old.[119]

151. After failing the 5th grade and being socially promoted to 6th grade, the school requested that Mr. Moore's parents agree to have him considered for an evaluation of his educational needs.[120] They agreed, and on the 24th of January 1973 Mr. Moore was given a psychological evaluation by Hollis King Ph.D and Marcelle Tucker[121]. The report states that the reason for referral is: *"Academic level for below grade level; withdrawn; takes no part in class unless called on"* The *'Relevant Background Information'* section confirms his poor academic performance: *"Repeated first grade -- all social promotions since that time."* They evaluated Mr. Moore's intellectual functioning by administering the Wechsler Intelligence Scale for Children (WISC) and he

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[117] pg 000853 TAB J

[118] TAB J

[119] ELEMENTARY TEST RECORD pg 000864 TAB J

[120] Parent Request pg 000857 TAB J

[121] HISD Center for Human Resources Development pg 000855 & 000856 TAB J

achieved a Full Scale IQ of 78 which equates to a Flynn-adjusted IQ score of **70.08**.

152. The evaluation also aimed to measure his mental age. Mr. Moore's actual age was 13 but a Bender Gestalt test calculated his mental age to be just 8 years and 11 months (107 months total). And a Goodenough Draw-A-Man test calculated his maturity to be just 9 years and 6 months (114 months total).[122]

153. The psychological evaluation continues by recommending that Mr. Moore be placed in the Precision Learning Center for reading and possibly for math: despite being in sixth grade, Bobby is only reading with 84% accuracy on second grade level -- meaning he is five years below his chronological age: and although he knows addition, he does not seem to realize that subtraction is the reverse of addition. Perhaps most tellingly, **the report recommends that teachers conduct daily drills with Mr. Moore -- now aged 13 -- on such basic things as days of the week, months of the year, seasons, standards of measure and telling time.**

154. That same year, Mr. Moore's Iowa Test score composite fell within the 5th percentile nationally: 95% of the test population would have done better than him[123]. Colleen McNeese, Mr. Moore's younger sister, recalls of this time: *"We were on the seventh grade level and they would give him like third grade work to do. And*

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[122] HISD Pyschological Evaluation TAB J

[123] IOWA TEST OF BASIC SKILLS pg. 000875 TAB J

I would have to stay after so I could help him"[124] Indeed, despite being younger than Mr. Moore, Colleen had helped him in class for at least a year and a half. *"He wouldn't participate in anything. It was because he didn't understand but they [teachers] didn't know that he couldn't read. So he asked me if I can come in my class and sit by me so that I can relate to him.*"[125] Mr Moore was also helped by his cousin, Parvena Williams, who remembers that, *"In third grade I did all of Bobby's schoolwork. The teacher finally separated us because she knew I was helping him. He could not do the work on his own without help.*"[126]

155. In 1974, Mr. Moore failed seventh grade and is socially promoted to eighth grade.[127]

156. In 1975, Mr. Moore failed every subject in eighth grade except for science -- in which he gained a grade of 'C' -- but once again he is socially promoted to ninth grade.[128]

157. In 1976, Mr. Moore failed every single subject in ninth grade[129] and never returned to school[130].

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[124] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[125] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[126] Parvena Williams Affidavit

[127] Permanent Records Grade 7-9 pg. 000859 TAB J

[128] Permanent Records Grade 7-9 pg. 000859 TAB J

[129] Permanent Records Grade 7-9 pg. 000859 TAB J

[130] Permanent Record Grades 9-12. pg 00872 TAB J

158. Mr. Moore recalls that he was a slow learner who *"could not read or write when he left school."*[131] Indeed, his family point out that Mr. Moore did not fail school because he did not try, or because he lacked motivation; *"Bobby always got low report cards and it upset him because he really tri[illegible]."* He would sit on the front porch with his siblings and try to do his homework but *"Bobby would get so frustrated"*[132].

159. This Court has placed substantial weight in Mr. Moore's well-documented academic limitations, and recognizes it as confirming that Mr. Moore's true intellectual limitations are best represented by IQ scores towards the lower end of the confidence interval.

160. This Court has noted the frequency of Mr. Moore's achieved grades, which are presented below:

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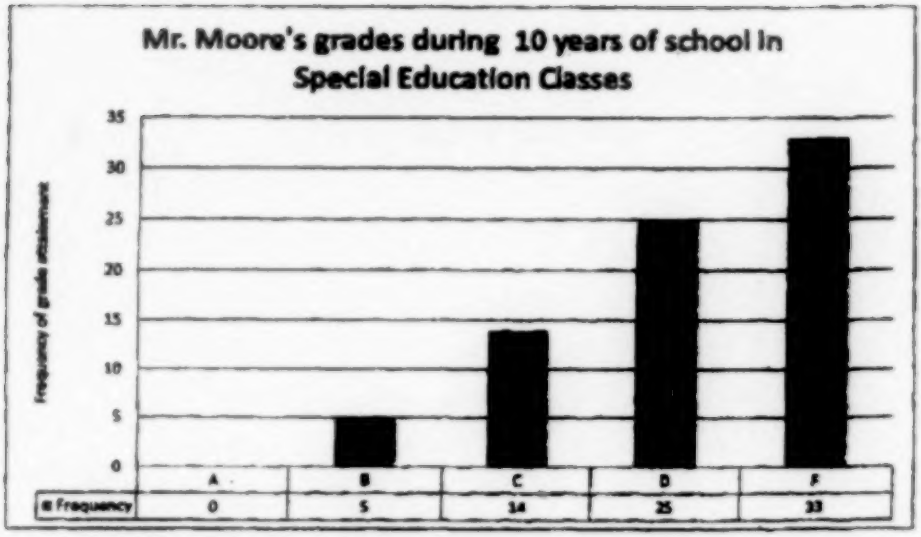
[131] Interview with Bobby Moore TAB C

[132] Interview with Clara Jean Baker pg 7655 TAB L



2. **The second adaptive behavior skill area is social.**

161. **Interpersonal relations.**

a. In 1965, when Mr. Moore was only six years old, after enrolling in Kindergarten at Atherton Elementary School, a school medical examination (at Atherton Elementary School) highlighted Mr. Moore's poor nutritional status and also stated of him: *"[The child is very] withdrawn -- psychological testing recommended. Referred to counselor."*[133] Comments regarding that same medical examination state: *"Child is very withdrawn -- maybe retarded but most likely emotional problems."*[134]

b. On the 24th of January 1973 Bobby was given a psychological evaluation by Hollis King Ph.D and Marcelle Tucker[135]. The report states that the reason for referral is: *"Academic level for*

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[133] pg 000853 TAB J

[134] pg. 000868 TAB J

[135] HISD Center for Human Resources Development pg 000855 & 000856 TAB J

below grade level; withdrawn; takes no part in class unless called on"

c. Mr. Moore remembers that *"it always seemed like people disliked me"*. And so the teacher singled him out for special treatment and put his desk alongside hers to stop the other children teasing him.[136]

162. **Following rules.** His report card from this period indicates that he is below average in the following categories: *Disciplines Himself, 'Is Courteous' 'Respects Property Rights', 'Is Attentive,' 'Follows Directions', 'Participates Well in Class Activities'*, and *'Does Neat and Orderly Work'*. This equates to below-average marks in seven out of 12 categories, as well as a *'General Conduct Grade'* of *'Unsatisfactory'*[137].

3. **The third adaptive behavior skill area is practical.**

163. In consideration of the fact that Mr. Moore has been incarcerated for nearly all of his adult life, this Court is left somewhat restricted when seeking evidence of his adaptive behavior, especially within the practical realm.

164. **Activities of daily living -- driving.** Mr. Moore never held a driving license, nor learnt to drive.

165. **Occupational skills.** After he left school, Mr. Moore never held a real job; he wanted to get a job working in a hospital so he *"got a man*

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[136] Interview with BM pg. 7548 TAB C

[137] Elementary School Report Card pg 000789 TAB J

outside to fill out the form but got too scared to go in"[138]

166. **Maintaining safe environments.** The Moore household were all very impoverished and food was often lacking. One may imagine that anyone in such a desperate environment might be driven to extremes, such as eating out of garbage cans. But what makes Mr. Moore's actions different from just anyone's is that despite being treated for ptomaine poisoning, Bobby continued to eat from neighbor's garbage cans and became sick again.[139] A non-retarded individual would have learned that eating the garbage had caused them to be ill and would have attempted to find an alternative food-source.

167. **Living independently.**

a. Lonnie Moore, Bobby's brother, recalls that Bobby was *"always a follower"*[140]

b. Larry Baker, who knew Bobby from his early childhood, remembers that *"Bobby always allowed those around him to make decisions for him,* [he was] *impressionable"*.[141]

c. Larry also recalled that *"He was easily led and very impressionable. He could be distracted or misled easily. We always watched out for him because he was simple. He could not be left on*

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[138] pg 802 TAB N and TAB C

[139] Affidavit of Colleen D. McNese TAB G

[140] Interview with Lonnie Moore TAB H

[141] Interview with Larry Baker pg 7695 TAB P

his own. People would take advantage if we did not watch out for him."[142]

d. Bobby lacks self-direction and this trait was clearly apparent: *"Bobby wasn't the one to decide things...he just went along with the program"*[143]

e. Interviews with Clara Jean Baker[144] and Marion Moore[145] confirm that Bobby lacked self-direction. He would never come to the family or to friends for assistance with problems. Even when he was kicked out of the house, he slept on the streets despite having friends and family who could have helped him.[146]

f. **There is no evidence that Mr. Moore was able to live independently of his family, even though he earned money through menial jobs.** Even after he was expelled from the family home he immediately sought the protection of someone he described as his 'playmama'.

g. This inability to live independently is also an adaptive deficit.

h. Since being incarcerated, Mr. Moore has been described by guards as a *'model prisoner'*. The very fact that he has adapted to life inside a prison so well, is almost certainly due to its

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[142] Barry Baker Affidavit

[143] Interview with Clara Jean Baker TAB L

[144] Affidavit of Clara Jean Baker TAB G

[145] Meeting with Marion Moore 05/27/00 pg 7664 TAB I

[146] Meeting BM 05/25/00 pg 7553 TAB C

highly regimented routine, which leaves little room for independent decision-making; all his food and shelter is provided for him and he doesn't have to maintain a job, nor be concerned with activities such as paying bills, that would in all likelihood perplex him.

168. This Court, therefore, finds that these records do not indicate a competency in Mr. Moore's intelligence or mathematical abilities for the purposes of disproving intellectual disability. It is also the view of this Court that these records are not appropriate tools by which to exclude intellectual disability in capital murder cases.

169. This Court finds that, in regards to the commissary records, although the actual goods delivered always met or nearly met the $85 spending limit, a closer examination of the records suggest this is not a valid indication of Mr. Moore's intelligence, or mathematical acumen. Throughout the 24 commissary order slips in evidence, which are the slips Mr. Moore fills out to request goods, there are numerous mathematical and spelling errors. Furthermore, the goods requested often add up to well over that which Mr. Moore is allowed to spend. For example, on the slip dated 12/19/2012 Mr. Moore requested $196.50 worth of goods -- a three-figure total seen in no fewer than 15 of the 24 slips. In fact only twice was Mr. Moore's request under the $85 spend limit (4/1/2013 and 7/5/2013). Mr. Moore has been using this form for at least 14 years, and on the 24 slips in evidence he orders almost the same thing every time. Reflecting on the evidence heard from Mr LeBanc, this Court finds that it is

impossible to discount whether or not Mr. Moore receives or previously received help filling out his forms; or whether he multiples the numbers, or simply spends all night adding the numbers. However, this Court does find that there is evidence to show that Mr. Moore has sufficient time to create the calculations on the order form out of sight of any Commissary Officer, and which on any view, cannot be considered complicated numerical calculations. And yet, despite the basic math involved and simple, unchanging spend limit, the excessive-ordering reflects a lack of understanding of these ordinary concepts.

170. Dr. Garnett's Assessment of Mr. Moore's Adaptive Functioning. Dr. Garnett states that:

a. *"In addition to having these various reported IQ scores supporting a diagnosis of Mental Retardation, Mr. Moore has exhibited significant limitations in adaptive behavior in several areas of his life for as long as records have been retrieved. There are sufficient historical references to his inability to live effectively in society and to manifest a variety of conceptual and practical skills.*

b. *"From both the perspective of the American Association on Mental Retardation and the American Psychiatric Association, Mr. Moore meets or exceeds threshold diagnostic criteria in the area of adaptive behavior deficit... From the standpoint of the American Association on Mental Retardation, 10th Edition 2002 Manual. Mr. Moore has historically manifested deficits in the "Social Adaptive Skill Area" in*

general, and in specific areas of both the Conceptual and Practical Realms.

c. *"The requirements of the AAMR Manual require significant deficits in one of the three major areas of adaptive skills. For Mr. Moore, this has primarily been in the Social Adaptive Behavior Skills Area, which includes problems in areas such as interpersonal, responsibility, naiveté, follows rules, and obeys laws. Specific deficits have also been historically recorded in self-direction, occupational skills, use of community and maintaining a safe environment. It could be argued that he has also manifested deficits in functional academics and health and safety.* ***This pervasive pattern of deficit clearly exceeds criteria.***

d. *"From the standpoint of the Diagnostic and Statistical Manual of the American Psychiatric Association -- Fourth Addition (DSM-IV), Mr. Moore has historically manifested deficits in "adaptive skill areas" such as social and interpersonal skills, use of community resources, self-direction, and work. The requirement for a diagnosis of mental retardation, self-direction, and work.*

e. ***The requirement for a diagnosis of Mental Retardation in the DSM-IV requires significant deficits in only two of eleven adaptive behavior areas. Mr. Moore has exceeded that threshold, concurrent with a variety of IQ scores within the range of diagnosis, over virtually his entire life."***

171. Dr. Garnett concludes his report by stating: ***"As a result of this assessment of the***

material submitted for review, it is my professional opinion that there is sufficient evidence to suggest that Mr. Moore has mental retardation..."

172. Dr. Borda's Assessment of Mr. Moore's Adaptive Functioning Dr. Borda. States:

a. "From the records which I reviewed recently, it appears that Mr. Moore would satisfy all of these definitions of Intellectual Disability, including those of the APA, the AAIDD, and the SSA. He clearly had marked deficits in adaptive functioning."[147]

b. "Examples of this include his being raised in a physically-and emotionally-abusive family environment, yet never seeking any outside intervention. When he would be "kicked out of the house", he would sleep on neighborhood porches or in cars rather than asking a neighbor or relative for assistance, When he finally did move out of his parent's home permanently, he "lived on the streets" for most of his teenage years; he sometimes was permitted to sleep in a back room of a pool hall in exchange for performing simple chores..."[148]

c. "His family was *very* poor and he often went without eating; Mr. Moore likely had severe nutritional deficits when he was a child, as well as numerous head injuries (from his father, from being beaten by others his age, and by jumping from a moving train) and both likely contributed to his intellectual

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[147] Borda Affidavit p. 3

[148] Borda Affidavit n. 3

deficiencies. By testimony from family members, Mr. Moore would eat from garbage cans when he was famished even though he had contracted food poisoning in the past from this behavior; this shows that he was not able to learn from past experiences."[149]

d. "He also had communication deficits, with speech impediment and difficulty grasping what others said. He was a very poor student, failed the first grade twice. And apparently only received "social promotions" in school after that point. He also was noted in school records to exhibit attentional deficits. After years of academic failure, Mr. Moore's school recommended when he was 13 years of age that his teachers conduct daily drills on such basic things as days of the week, months of the year, seasons, standards of measure, and telling time. This suggests that his intellectual limitations were profound."[150]

e. "He was reported by family members to "always be a follower", and relied on others to make decisions for him. He was described by teachers as being "very withdrawn", so it is obvious that he had very limited social skills as well as deficits in adaptive functioning."[151]

173. Dr. Greenspan's Assessment of Mr. Moore's Adaptive Functioning

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[149] Borda Affidavit p.3

[150] Borda Affidavit p.3

[151] Borda Affidavit p.3

a. Dr. Greenspan noted evidence of adaptive deficits across a broad spectrum.

174. Dr. Williams-Anderson's Assessment of Mr. Moore's Adaptive Functioning

Dr. Williams-Anderson stated in her report:

a. "The current evaluation, including records review and a family interview, was conducted to assess domains of cognitive functioning. It seems that Bobby exhibited developmental and intellectual delays early in his life that. were significant enough for him [Mr. Moore] to require consistent monitoring and elicit help from his teachers."

b. "These deficits were demonstrated much prior to the age of 18, which would satisfy criteria for formal diagnosis of Intellectual and Developmental Disability (IDD, formerly referred to as Mental Retardation.

c. "Adaptively, he [Mr. Moore] had some abilities as they relate to self-care, motor skills, and daily living."

d. "He [Mr. Moore] had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition."

e. "Thus, there is historic information that accounts for Bobby's intellectual, developmental, and adaptive deficits; and indicates that he [Mr. Moore] met full criteria for a diagnosis of mental retardation as a child."

175. Dr. Compton's Assessment of Mr. Moore's Adaptive Functioning (From her report

a. Mr. Moore's accrued academic skills while incarcerated are a string indicator of his ability to learn and process information, which is not consistent with a diagnosis of mental retardation.

b. His ability to compose prose within the early college level exceeds the usual grade level attainment of those in the upper bounds of mild retardation.

c. Mr. Moore showed evidence of adaptive functioning skills during the commission of the offense and after the offense, which questions the validity of a mental retardation diagnosis.

Findings of Fact regarding Adaptive Behavior Deficit

176. This Court recognizes that the AAIDD manual requires *'performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills.*[152]'

177. This Court is satisfied that sufficient evidence has been provided to demonstrate that Mr. Moore's adaptive behavior in at least one of the skill-sets is approximately two standard deviations below the mean.

G. ONSET DURING THE DEVELOPMENTAL PERIOD.

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[152] AATDD pg 43

178. There is ample of evidence that Mr. Moore suffered from significant deficits in adaptive functioning -- the outward manifestations of a significant limitation in intellectual functioning -- before the age of 18.

179. An extraordinary number of the risk factors commonly associated with mental retardation were present prior to Mr. Moore's 18th birthday. Moreover, no evidence was presented that established an intervening cause after the age of 18 that could account for Mr. Moore's substandard intellectual functioning. As noted above, the adaptive behavior deficits were certainly apparent in Mr. Moore before the age of 18.

H. DETERMINATION CONCERNING MENTAL RETARDATION

180. Mr. Moore has mental retardation. His mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the AAMR, and the decisions of *Atkins* and *Briseno*.

181. The finding of retardation is further supported by the determination of three highly qualified expert witnesses -- Dr. Garnett, Dr. Borda, Dr. McGrew, and Dr. Williams-Anderson -- that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning.

182. Taking all of this into account, all three of the expert witnesses have credibly opined that Mr.

Moore meets the diagnostic criteria for mental retardation intellectual functioning.

II. CONCLUSION OF LAW

183. This court finds that Mr. Moore, by a preponderance of the evidence, has established that he meets the definition of mental retardation under the current guidelines of the AAIDD, under both the DSM-IV and DSM-V, and under the prevailing legal standards per *Atkins v Virginia*, 536 U.S. 304 (2002). The record is replete with clear indications from his early childhood risk factors, sub-normal intellectual functioning, and adaptive deficits that would qualify Mr. Moore as mentally retarded.

184. Mr. Moore's evidence of improvement in elementary school level reading and writing after three decades in a controlled environment on death row are not sufficient evidence to counter the large historical record and the testimony at the hearing. The fact that he was able to improve and showed diligent effort is indicative of evolution in his character, not in a change in his limitation.

185. This court also notes that there such strong evidence of Mr. Moore's disability that is takes the unusual step of recommending to the Court of Criminal Appeals, that should it disagree with this courts review of the evidence that there is still more than enough to justify a jury being given the question of his retarding of the special issues under a new punishment proceeding. This case was decided post-*Penry* I. but before *Atkins v. Virginia*, thus it falls under

an unusual legal cusp that would merit another proceeding to determine this issue if the Court of Criminal appeals disagrees with this courts findings.

186. It is therefore the recommendation of this court that relief be GRANTED, and that the Court of Criminal Appeals either reform the judgment of death to one of life in prison under *Atkins v. Virginia*, 536 U.S. 304 (2002); in the alternative that the Court of Criminal Appeals remand this matter for new trial on punishment so that a Harris County jury may determine Mr. Moore's mental retardation under the special issues.

Signed this 6 day of Feb 2014

/s/_____

Judge Susan Brown
Judge, 185th Judicial District Courts
Houston, Texas

The clerk shall transmit a copy of this finding to the CCA upon the date of this order.

APPENDIX C

185TH DISTRICT COURT
HARRIS COUNTY, TEXAS

No. 314483-C

EX PARTE BOBBY JAMES MOORE

Respondent's Proposed Findings of Fact,
Conclusions of Law, and Order

January 23, 2014

The Court, having considered the applicant's application for writ of habeas corpus, the respondent's answer, any exhibits attached to said documents, and official court documents and records in cause numbers 314483, 314483-A, 314483-B, and 314483-C, including the hearing on the instant application, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Procedural History

1. Applicant Bobby James Moore was convicted upon indictment of the felony offense of capital murder in cause number 314483 in the 185th District Court of Harris County, Texas. After the jury answered the special issues, the trial court, on July 22, 1980, assessed applicant's punishment at death.

2. Counsel C.C. Devine and Al Bonner represented applicant at trial in cause number 314483.

3. The Court of Criminal Appeals affirmed applicant's conviction on October 9, 1985, and the United States Supreme Court subsequently denied Moore's petition for writ of certiorari. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113, 106 S.Ct. 1167 (1986).

4. On October 27, 1999, the United States Court of Appeals for the Fifth Circuit ordered a new punishment hearing in applicant's case. *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

5. A second jury heard applicant's case and answered the special issues. Pursuant to the second jury's answers, the 185th District Court of Harris County, Texas, on February 14, 2001, assessed applicant's punishment at death.

6. Counsel Robert Morrow, represented applicant at the second punishment hearing in cause number 314483.

7. The Court of Criminal Appeals affirmed applicant's punishment on January 14, 2004, and the United States Supreme Court subsequently denied Moore's petition for writ of certiorari. *Moore v. State*, No. 74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

8. Applicant filed the instant application on June 17, 2003, and a supplemental writ on April 21, 2009.

9. The Court ordered previous counsel to file an affidavit addressing applicant's claims.

10. Counsel Robert Morrow filed an affidavit on April 3, 2008.

11. The Court held an evidentiary hearing on January 2 and January 3, 2014, to receive evidence relevant to applicant's claim under *Atkins v. Virginia*, 36 U.S. 304 (2002), which prohibits the execution of mentally retarded persons, and heard argument on the evidence on January 23, 2014.

General Findings of Fact

12. The Court finds that all exhibits entered into evidence at the evidentiary hearing on applicant's writ are credible, reliable, and truthful.

13. The specific findings of fact that follow are based on the records in cause numbers 314483, 314483-A, 314483-B, and 314483-C, exhibits, and witness testimonies that support them.

14. To the extent that witnesses testified differently concerning matters addressed in the specific findings of fact that follow, the Court finds: (1) the witness testimony supporting the finding of fact to be credible and truthful; and (2) the witness testimony controverting the finding of fact to be incredible and untruthful.

15. The Court has resolved any relevant factual discrepancy not specifically addressed in its findings of fact in the manner supporting its recommendation on relief.

Factual Findings About the Capital Offense

16. Seventy-three year old James McCarble and Edna Scott were working at the Birdsall Market on Friday, April 25, 1980 (CR4 at 1383-84; RR25 at 87-96).[1]

17. On that date, applicant Bobby James Moore and Anthony Everett Pradia and Willie Albert Koonce had been at applicant's house talking about doing a robbery; applicant retrieved a shotgun and pistol from his room and the three left (CR5 at 1644-47; WH RR at State's Exhibit 4).

18. Koonce, Pradia, and applicant rode around in Koonce's car looking for a store to rob (CR5 at 1648; RR25 at 262; WH RR at State's Exhibit 4).

19. Koonce and Pradia entered the store and purchased beer; they then returned to the car and told applicant that there was an old man and an old woman working in the courtesy booth as well as a pregnant woman that sold them the beer (RR25 at 262; WH RR at State's Exhibit 4).

20. Applicant, Pradia, and Koonce drove around for a while and then returned to the store; Koonce entered to ask for change for a $20 bill so he

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[1] The record consists of multiple clerk's record volumes ("CR# at X" where "#" corresponds to the volume number and "X" corresponds to the page number in the bottom left) that contain the clerks record and reporter's record from the original trial, the clerk's record on applicant's punishment rehearing ("2CR# at X"), the reporter's record from applicant's punishment rehearing ("RR# at X"), the clerk's record from applicant's writ hearing in this case ("WH CR# at X"), and the reporter's records from applicant's writ hearing in this case ("WH RR# at X").

could see if the store had money (RR25 at 262; WH RR at State's Exhibit 4).

21. Koonce returned to the car and told applicant and Pradia that the job would not be a problem (RR25 at 262; WH RR at State's Exhibit 4).

22. Applicant retrieved his shotgun from the car's trunk and then returned to the car, where the three discussed robbing the store and then drove around again (RR25 at 262-63; WH RR at State's Exhibit 4).

23. The three argued over how to split the proceeds of the robbery; specifically, they argued over the fact that Koonce wanted an extra $200.00 from applicant and Pradia for letting them use his car in the robbery (WH RR at State's Exhibit 4).

24. The three agreed that Koonce would rob the courtesy booth, Pradia would rob the cash register, and applicant, armed with his shotgun, would watch the booth and the front of the store (RR25 at 263; WH RR at State's Exhibit 4).

25. Pradia was armed with a pistol (RR25 at 263; WH RR at State's Exhibit 4).

26. Prior to entering the store, applicant disguised himself by putting on sunglasses and a wig (CR4 at 1396, 1400, 1411, 1416; CR5 at 1654, 1661; RR25 at 182, 263; WH RR at State's Exhibit 4).

27 Prior to entering the store, applicant concealed his shotgun by covering it with two shopping bags (CR4 at 1537-38; CR5 at 1654, 1889-90; RR25 at RR25 at 182, 263; WH RR at State's Exhibit 4).

28. Koonce entered the courtesy booth and ordered McCarble to fill a bank bag with the store's money; Scott yelled that they were being robbed and everyone in the store turned to look (RR25 at 182, 223, 263).

29. Applicant pointed his shotgun through the booth's window at McCarble, whose hands were raised in the air (RR25 at 183, 224).

30. Applicant raised up on his toes, sighted down the shotgun's barrel at McCarble's head, and shot McCarble in the center of his forehead (RR25 at 62, 115, 187-89, 209).

31. The shotgun blast blew off the top of McCarble's head, killing him instantly and splattering blood and brain matter in the courtesy booth (RR25 at 62, 115, 187-89, 209).

32. Koonce, Pradia, and applicant fled the store, taking $1,800 of the store's money but leaving behind the shopping bags previously used by applicant to conceal his shotgun (CR4 at 1534-35; RR25 at 105-07, 133-34, 209).

33. Following the robbery, Leonard Goldfield, the store's owner, recovered a yellow bag containing a wig from the store's parking lot and was given a white bag found by a customer inside the front of the store (RR25 at 105-06).

34. One of the bags contained a receipt bearing the name Betty Nolin and address 5906 Southville (CR4 at 1343; RR25 at 203-07).

35. Betty Nolin was applicant's aunt and the person he was staying with at the time of this robbery (CR4 at 1344).

36. A customer noted the description and license plate number of Koonce's car as the three fled the store after the robbery (RR25 at 245).

37. Applicant, Koonce, and Pradia drove to applicant's "play mother's" (Betty Nolin's) house at 5906 Southville after the robbery (RR25 at 264).

38. The next day, police stopped Koonce in his car and found Pradia's wallet in his car (CR4 at 1356, 1359, 1361, 1369-70; RR25 at 246; RR26 at 32).

39. Koonce gave the police a statement, naming Pradia and applicant (RR26 at 26, 32).

40. Pradia subsequently surrendered to the police and also gave a statement naming applicant (RR25 at 246).

41. The police secured an arrest warrant for applicant (RR25 at 247; RR26 at 24).

42. Applicant fled to his grandmother's house in Louisiana following the robbery and was arrested there (RR25 at 247; RR26 at 24).

43. Police found a loaded pistol and money under applicant's bed at his grandmother's house (RR26 at 25).

44. Applicant shaved his head between the time of the crime and the time he was arrested in Louisiana (CR4 at 1502-03).

45. Applicant gave a statement confessing to shooting McCarble, but claiming that the shotgun discharged accidentally (RR25 at 264).

46. In applicant's statement, he confessed to: driving around with Koonce and Pradia in Koonce's car; planning to rob a place in advance;

arguing with Koonce about Koonce wanting an extra $200 from applicant and Pradia, each, for letting them use his car; wearing a wig; concealing his shotgun inside shopping bags; trying to push the complainant back with the shotgun barrel; and discharging the shotgun accidentally when he fell backwards (WH RR at State's Exhibit 4).

47. Prior to his statement, police officers read applicant his *Miranda* warnings; applicant had no trouble understanding them and agreed to waive his rights (CR4 at 1423-36; CR5 at 1684-90; RR25 at 261-68).

48. Police went to the address on the receipt, 5906 Southville, and recovered the shotgun (RR25 at 69, 71, 250-51).

49. The shotgun did not discharge accidentally, evidenced by the fact that it was in good working order and its trigger pull was at least 3.5 pounds (RR26 at 16-17).

50. While inside the residence at 5906 Southville, police observed six mannequin heads; four of the heads had wigs on them (RR25 at 69, 71, 250-51).

51. Two weeks before this capital murder, applicant and two other men robbed Sarah Hitchcock Collins while she was working inside the courtesy booth of the Barnes Minimax grocery store; during that robbery, applicant stood in front of the courtesy booth and pointed a shotgun at Collins and her daughter (who was also present) (RR26 at 54-57).

52. A week before this capital murder, applicant and another man robbed Stella Gattie when she was working as a checker at the Minimax grocery store; during that robbery, applicant pointed a shotgun at Gattie's back while another man pointed a pistol at her and demanded money (RR26 at 58, 60-61).

53. Applicant had previously been convicted of (State's Exhibit 34):

    a. Burglary of a habitation on January 19, 1977;

    b. Burglary of a habitation on February 2, 1977;

    c. Aggravated robbery on December 20, 1976; and

    d. Burglary of a habitation on December 25, 1976

54. Applicant had also committed numerous infractions while incarcerated on death row between his original trial and his punishment rehearing (State's Exhibit 38).

* * *

Applicant's Fourth Through Fourteenth Grounds For Relief

182. In his fourth, eighth, and eleventh grounds for relief, applicant argues that he received ineffective assistance of counsel based on counsel's failure to request that the trial court define the following terms in the special issues submitted to the jury in punishment: "conduct," "continuing threat to society," "society," and "culpability."

183. Applicant argues that trial counsel should have requested definitions of those terms pursuant to TEX. CODE CRIM. P. art. 3.01.

184. In his sixth, ninth, and thirteenth grounds for relief, applicant alleges that the trial court erred in not charging the jury with definitions of those terms after the jury requested them.

185. In his fifth, seventh, tenth, twelfth, and fourteenth grounds for relief, applicant alleges that he received ineffective assistance from his appellate counsel based on appellate counsel not raising on direct appeal the issues he now raises in his fourth, sixth, eighth, ninth, eleventh, and twelfth grounds for habeas relief.

186. Applicant alleges that the lack of such definitions and the alleged ineffective assistance of trial and appellate counsel violated his rights pursuant to U.S. CONST. amends. V, VI, VIII, and IX, and TEX. CONST. art. I, §§ 10 and 19.

187. During punishment deliberations in this case, the jury sent a note stating: "'Conduct' in Special Issue No. 1 implies a 'global' activity inclusive but not limited to the planning, preparation, and execution of the crime (ie: Robbery and shooting). 'Act' as used in the definition of deliberately implies the specific event of discharging the weapon which results in the death of the deceased. What level of activity must the jury assign to the term 'conduct' to which 'deliberately' is applied?" (2CR2 at 496). The court replied in writing, "I can only refer you to the charge of the court" (2CR2 at 496).

188. During punishment deliberations in this case, the jury sent a note stating: "On Special Issue #2 'constitute a continuing threat to society,' if

the alternative to death is life imprisonment, by definition in, our view of society, it is impossible to be a continuing threat. Please define 'continuing threat to society' and 'society' as it relates to our deliberations" (2CR2 at 497). The court replied in writing, "the Court cannot further define 'society'" (2CR2 at 497).

189. During punishment deliberations in this case, the jury sent a note stating: "Please provide the definition of 'culpability'" (2CR2 at 501). The court replied in writing, "the Court can only refer you to the charge" (2CR2 at 501).

190. The jury did not ask for the definition of "conduct."

191. In Defendant's Motion to Set Aside the Indictment (Unconstitutionality of Statute), trial counsel objected to the constitutionality of the Texas death penalty scheme for failure to "define the various terms and phrases used in the three special issues in ways that would permit the jury to give full mitigating significance to those terms (2CR2 at 300).

192. Trial counsel Morrow has submitted an affidavit stating that the law requires no special definitions and he feels that the court would have refused his request to provide them.

193. Morrow also represented applicant on direct appeal.

194. Morrow's affidavit also states that he feels these arguments would have been meritless on direct appeal.

Applicant's Fifteenth and Sixteenth Grounds For Relief

195. In applicant's fifteenth ground for relief he claims that the trial court violated TEX. CODE CRIM. P. art. 36.27 by not communicating with the jury in open court with a court reporter present.

196. Applicant argues that the trial court's alleged error denied his right to effective assistance of counsel, a fair trial, due process, and equal protection of the law pursuant to U.S. CONST. amends. V, VI, VIII, and IX, and TEX. CONST. art. I, §§ 10 and 19.

197. In applicant's sixteenth ground for relief he alleges that he received ineffective assistance of appellate counsel based on appellate counsel not raising such a claim on appeal.

198. During the punishment deliberations of applicant's case, the court replied to the jury's notes with the written answers detailed in the findings of fact to applicant's fourth through fourteenth grounds for relief.

199. The record from applicant's punishment rehearing is silent as to whether counsel and applicant were present in court during these responses or whether counsel objected to the proceedings or the trial court's answers.

200. The jury's notes and the trial court's written replies are part of the clerk's record in this case (2CR2 at 494, 496-97, 499, 501).

201. Appellate counsel Morrow has submitted an affidavit stating that, even if the claim

advanced in applicant's fifteenth ground for relief were error, it would have been harmless.

Applicant's Seventeenth Through Twentieth Grounds For Relief

202. In his seventeenth ground for relief, applicant argues that the trial court erred in failing to properly instruct eh jury concerning its conduct after sequestration in violation of TEX. CODE CRIM. P. art. 35.23 and his constitutional rights under U.S. CONST. amends. V and XIV, and TEX. CONST. art. I, §§ 10 and 19.

203. In his eighteenth ground for relief, applicant contends that his appellate counsel was ineffective for failing to raise such a claim on direct appeal of his punishment rehearing.

204. In his nineteenth ground for relief, applicant contends that he received ineffective assistance of trial counsel when trial counsel failed to object to the trial court's alleged noncompliance with article 35.23.

205. In his twentieth ground for relief, applicant contends that his appellate counsel was ineffective for failing to claim on direct appeal that his trial counsel was ineffective for failing to object to the court's alleged noncompliance with article 35.23.

206. Applicant did not object to the court sequestering his jury after reading the punishment charge or to the sequestration procedures applied.

207. The trial court discussed the prospect of sequestration with the jury the day before jury arguments were given and instructed the jury

to bring supplies and clothing in the event they were needed (RR29 at 66-68).

208. The bailiff indicated to the trial court that "we talked about that," and the trial court subsequently told the jury that "...the bailiff will instruct you" (RR29 at 68).

209. According to the record, trial counsel, prosecutors, and applicant were present during these discussions, and trial counsel did not object to the discussion (RR29 at 65-68).

210. Morrow's affidavit states that he in not aware that error exists and does not see this issue as providing any valid basis for relief in the trial court or in the appellate court.

Applicant's Twenty-First Through Twenty-Third Grounds For Relief

211. In his twenty-first ground for relief, applicant alleges that the evidence is legally insufficient to prove future dangerousness beyond a reasonable doubt.

212. In his twenty-second ground for relief, applicant alleges that the evidence is factually insufficient to prove that he is a continuing threat to society, placing special emphasis on his twenty-one years of good conduct while in prison leading to his punishment rehearing.

213. In his twenty-third ground for relief, applicant alleges that the evidence is factually insufficient to prove that he "deliberately" caused the complainant's death.

214. Applicant raised these claims on direct appeal and they were rejected. *Moore v. State*, No. 74,059, slip op. at 2-6, 2004 WL 231323 (Tex.

Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Twenty-Fourth Ground For Relief

215. In his twenty-fourth ground for relief, applicant claims that TEX. R. EVID. 606(b) is unconstitutional and violates due process and U.S. CONST. amend. VI because it prohibits consideration of the affidavit of jury foreman Fred Baca, which states that the jury considered parole during its deliberations.

216. Applicant raised this issue on direct appeal, but the Court of Criminal Appeals held that applicant inadequately briefed the point of error and, further, waived the claim because he did not timely object on this basis. *Moore v. State*, No. 74,059, slip op. at 9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Twenty-Fifth Ground For Relief

217. In his twenty-fifth ground for relief, applicant contends that the Texas death penalty scheme is unconstitutional as applied because its single aggravating factor of future dangerousness is weighted towards an arbitrary sentence of death when the jury had no discretion in his case to assess a sentence of life without parole.

218. In support, applicant relies upon an affidavit of jury foreman Fred Baca as evidence that his jury was unable to give effect to his good conduct in prison and, had they been able to

give such effect, it "would nullify their finding" that he was a continuing threat to society.

219. Applicant did not object to the constitutionality of the Texas death penalty scheme as applied based on the jury's inability to assess a sentence of life without parole.

220. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

221. Applicant's jury was able to consider his behavior in prison within the scope of the future dangerousness special issue. *See Felder v. State*, 848 S.W.2d 85 (Tex. Crim. App. 1992) (defendant's good deeds while in prison constitutes evidence within scope of future dangerousness special issue); *Hughes v. State*, 897 S.W.2d 285 (Tex. Crim. App. 1994) (defendant's evidence, including evidence of twelve years of good behavior while in prison, could be considered within scope of special issues and did not require additional *Penry*-type instruction).

222. Applicant's jury was also able to consider his good conduct in prison as an aspect of his character, when answering the mitigation special issue asking whether there was evidence, including evidence of applicant's character, that was a sufficient mitigating circumstance to warrant a sentence of life rather than death (2CR2 at 504).

223. This court instructed the jury, "a mitigating circumstance may include, but is not limited to,

any aspect of the defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case" (2CR2 at 489).

Applicant's Twenty-Sixth Ground For Relief

224. In his twenty-sixth ground for relief, applicant claims that the Texas death penalty scheme is unconstitutional as applied because the "continuing threat" special issue is not susceptible to proof beyond a reasonable doubt and the jury could not apply the reasonable doubt rule fairly in the context of such issue.

225. Applicant failed to object at trial on the basis that the Texas death penalty scheme is unconstitutional as applied because the "continuing threat" special issue is not susceptible to proof beyond a reasonable doubt and the jury could not apply the reasonable doubt rule fairly in the context of such issue.

226. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 10, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

227. Prior to trial, applicant objected to the constitutionality of the Texas death penalty scheme based, in part, on a capital jury not being informed of a capital defendant's parole eligibility if the jury assessed a life sentence (2CR2 at 150-348).

228. Applicant's current complaint is in conflict with this argument; applicant now argues that the "mere possibility of parole has the

inevitable effect of reducing the prosecution's burden [on the issue of future dangerousness] to virtually zero." *Applicant's writ at 121.*

Applicant's Twenty-Seventh Ground For Relief

229. In his twenty-seventh ground for relief, applicant alleges that the trial court erred in denying his objection to the statutory definition of mitigating evidence and in denying his requested instruction clarifying the scope of the mitigation as including factors the jurors might believe made the death penalty inappropriate without narrowing the factors relating to his moral culpability.

230. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 10, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

231. Applicant filed a pretrial motion objecting to the constitutionality of the Texas death penalty scheme on the basis that the definition of mitigating evidence "limits the eighth amendment concept of 'mitigation' to factors that render a capital defendant less morally 'blameworthy' for commission of the capital murder" (2CR2 at 313).

232. At the conclusion of the evidence, applicant requested that the jury instruction dealing with the "idea of mere sentiment or sympathy" be deleted (RR29 at 75-76).

233. Applicant argued that the instruction denied him his right, pursuant to U.S. CONST. amend. VIII, to have the jury give effect to

certain mitigating evidence and informed the jury that it could not be "influenced by any sympathetic response to that evidence or any sympathy they may feel for the defendant based on the evidence" (RR29 at 76).

234. The trial court denied the applicant's request to delete the "mere sentiment or sympathy" instruction, and the applicant requested the following "clarification": "Mere sympathy in the instruction means sympathy not tied to or based on any evidence you have heard. You may give effect to any sympathetic response you have to the evidence if you determine that it's mitigating and that it makes a life sentence more appropriate for the defendant than the death penalty. (RR29 at 76-77).

235. The trial court denied the requested charge. (RR29 at 77).

236. Applicant later requested that the trial court include the full statutory explanation of mitigating circumstances so that the jury would be instructed that "a mitigation circumstance may include but is not limited to any aspect of the defendant's character, background, record, emotional instability, intelligence or circumstances of the crime which you believe can make a death sentence inappropriate is this case" (RR30 at 3).

237. Applicant argued that the trial court's "shortened" version violated his constitutional rights, pursuant to U.S. CONST. amend. VIII, and the trial court denied the applicant's request (RR30 at 3).

238. The trial court instructed applicant's jury that it could consider all evidence submitted in answering the special Issues (2CR2 at 487).

239. The trial court also gave the jury the following mitigation instruction: "You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and thereafter, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. You are further Instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues" (2CR2 at 489).

240. The court then submitted the following mitigation special issue to the jury: "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Bobby James Moore, that there is a sufficient mitigating circumstance or

circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" (2CR2 at 504).

Applicant's Twenty-Eighth Ground For Relief

241. In his twenty-eighth ground for relief, applicant alleges that he was denied his right of allocution, namely, that he was not allowed to give a final personal statement of remorse before the jury deliberated and while free from cross-examination.

242. Specifically, applicant refers to the inadmissible affidavit of jury foreman Fred Baca, tendered as a defense exhibit at the applicant's motion for new trial, in which Baca states he would have considered an expression of the applicant's remorse as favorable evidence. *Applicant's writ at 143.*

243. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 10-11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

244. During applicant's trial, the trial court denied applicant's request that he be allowed to give a statement, while remaining free of cross-examination, accepting responsibility for his actions, expressing remorse for the complainant's death, and hoping that the applicant's family found closure (RR29 at 4-5).

245. Subsequently, applicant made a bill of exception for the record, and the trial court

denied applicant's request to publish the statement to the jury (RR29 at 69-70).

Applicant's Twenty-Ninth Ground For Relief

246. In his twenty-ninth ground for relief, applicant argues that the trial court erred in denying his requested jury instruction allowing the jury to consider any residual doubt as a mitigating circumstance when answering the special issue.

247. Specifically, applicant argues that he was deprived of his right to place all mitigating evidence, including the circumstances of the offense, within the jury's effective reach in deciding punishment.

248. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

249. Applicant's requested instruction stated: "You are instructed that you may consider as mitigating circumstance in answering each special issue any doubt you may have about the defendant's guilt, if in fact you have such a doubt. A lingering or residual doubt is not the same as a reasonable doubt. You have been informed that a previous jury found the defendant guilty of capital murder and intentional killing yet you have also heard evidence the jury did not hear, evidence of the defendant's statement that he did not intend to kill the victim and that the gun discharged accidentally. Therefore, there may be some genuine doubt of the defendant's guilt. It may

reflect the mere possibility. It may be the thought of one juror or several. This kind of doubt can be valid consideration in determining whether the State has proved beyond a reasonable doubt that the defendant's conduct that caused the death—the victim's death was committed deliberately under Special Issue Number One and whether the defendant will commit criminal acts of violence that will constitute a continuing threat to society under Special Issue Number Two. Further, such doubt can be a valid reason in the jurors's discretion for not imposing the ultimate and irrevocable penalty of death under Special Issue Number Three." (RR29 at 73).

Applicant's Thirtieth Ground For Relief

250. In applicant's thirtieth ground for relief he claims that the trial court erred in refusing his requested jury instruction on a presumption arising from the loss or destruction of evidence.

251. Specifically, applicant refers to the destruction of his shotgun after his 1980 trial and argues that such destruction harmed him in the jury's consideration of the "deliberateness" special issue.

252. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 7-9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

253. At the conclusion of State's case and before applicant presented evidence, the trial court granted the State's motion to reopen its case to

present the testimony of Jim Haley, Harris County Sheriff's Office (RR27 at 6).

254. Haley, the custodian of records for the Harris County Sheriff's Office, brought to the court the records of the Sheriff's Office pertaining to the investigation of a 1981 burglary in the judge's chambers in the 185th District Court (RR27 at 7).

255. Haley testified that a 12-gauge shotgun, serial number 86740, was admitted into evidence in the applicant's trial in 1980 and that it was stored in the anteroom of the judge's chambers after the trial (RR27 at 8).

256. In April, 1981, someone broke into the judge's anteroom and handled the shotgun, so the Sheriff's Office removed the shotgun from the judge's chambers and processed it for fingerprints (RR27 at 9).

257. When the shotgun was manually logged into the Sheriff's property room, the log noted that the gun was to be returned to the court (RR27 at 13).

258. However, due to clerical error, the shotgun remained in the property room for approximately ten years (RR27 at 9).

259. After the shotgun had been in the property room about nine years, the property room was computerized and the Sheriff's Office believed that the shotgun was erroneously entered as code 99999, an unknown type of offense or found property, instead of code 99900, the code for a homicide (RR27 at 9-10).

260. The Sheriff's Office disposes of found property as a matter of standard procedure if an order is not located (RR27 at 10).

261. However, weapons are not returned to any type of circulation in the public (RR27 at 10).

262. On April 21, 1991, the shotgun was destroyed, i.e., melted down, as part of a general destruction order, signed by a judge, composed of six and half pages of listed guns and property, because the Sheriff's Office is unable to retain all property forever (RR27 at 11).

263. The subsequent investigation did not reveal any evidence that the gun was intentionally destroyed to harm the applicant (RR27 at 13-4).

Applicant's Thirty-First Ground For Relief

264. In his thirty-first ground for relief, applicant contends that the trial court erred in refusing his requested jury instruction that the burden of proof on the "continuing threat" special issue incorporated the same burden of proof concerning extraneous offenses and that the jury had to find beyond a reasonable doubt that the applicant had committed an extraneous offense before considering it when answering any special issue.

265. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 11-12, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

266. Applicant requested the following jury instruction: "You may consider evidence of an extraneous offense or act of misconduct in answering the special issues but only if they have been shown by the State beyond a reasonable doubt to have been committed by the defendant. The State's burden of proving beyond a reasonable doubt the defendant's commission of any extraneous offenses or acts of misconduct arises from and is incorporated into the State's burden of proof [for] a yes answer to Special Issue Number Two beyond a reasonable doubt. (RR29 at 74-5).

267. The trial court denied the requested instruction (RR29 at 75).

Applicant's Thirty-Second Ground For Relief

268. In his thirty-second ground for relief, applicant complains that the trial court imposed an unconstitutional limit on the scope of mitigation in violation of the requirement of individualized sentencing, pursuant to U.S. CONST. amend. VIII.

269. Specifically, the applicant argues that the trial court erred in limiting the testimony of JoAnn Cross.

270. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 13-14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

271. JoAnn Cross, an English solicitor, testified that she came to know applicant though her mother

who began corresponding with applicant in 1990 through an organization called Lifelines (RR29 at 45).

272. When asked what kind of person Cross' mother was, the State objected as to relevancy and hearsay (RR29 at 46).

273. During a bench conference, trial counsel acknowledged that Cross was not an expert witness but was being presented, in lieu of Cross' now-deceased mother, to show the profound effect that Cross' mother had on the imprisoned applicant (RR29 at 46).

274. Outside the presence of the jury, applicant proffered Cross' following testimony: that her mother came from a poor English family. but she achieved, academically motivating her to "reach out" to someone like applicant; that her mother wrote inspirational letters to applicant emphasizing the power of education; that her mother's relationship with applicant was a great joy to her; that applicant's spelling and writing style was not good initially but that her mother noticed his development; that her mother sent applicant books and postcards that they discussed in their correspondence and that allowed applicant to broaden his cultures; that her mother thought that such vicarious travel was beneficial to applicant; that applicant sent gifts he had crafted to Cross and her mother; that her mother was devastated when she learned that applicant's execution was scheduled in 1993; that Cross promised her mother before her mother's death to take care of applicant; and that applicant sent a moving,

sympathetic letter after her mother's death (RR29 at 48-53).

275. At the conclusion of applicant's proffer, the trial court ruled that Cross' testimony pertaining to her mother was inadmissible (RR29 at 54).

276. The State then informed the trial court that it would not object to testimony concerning the effect of applicant's sympathy letter to Cross and the trial court agreed to the admission of such testimony and also testimony regarding the fact that Cross' mother corresponded with applicant (RR29 at 55-57).

277. In the jury's presence, Cross testified that her mother began corresponding to applicant while he was in prison, and applicant wrote Cross a profoundly moving, compassionate letter when her mother died (RR29 at 57-61).

278. In the jury's presence, Cross testified that she began corresponding with the applicant in 1993 and, during the correspondence, applicant's grammar, spelling, use of language, and understanding of cultural and political issues improved (RR29 at 57-61).

279. Cross testified that applicant showed appropriate emotions, such as joy or sympathy, and that he had grown tremendously as a person (RR29 at 60).

280. Cross testified that she took the "assignment" because of her mother and the profound effect that applicant had on her mother, and because she promised her mother that she would stand by applicant (RR29 at 60-1).

281. Cross testified that she greatly respected applicant (RR29 at 61).

282. Cross testified that Applicant sent her jewelry boxes that he made in prison (RR29 at 57-61).

283. As shown above, Cross essentially testified as proffered with the exception of testimony concerning her mother's motivation to help applicant, the contents of her mother's letter, and her mother's feeling toward applicant, their correspondence, and applicant's execution.

284. Applicant presented essentially the same testimony through other witnesses: that applicant grew as a person in prison, gaining compassion and kindness, and that the applicant greatly improved educationally (RR29 at 63, 92-5, 137-8, 140-1, 148).

Applicant's Thirty-Third and Thirty-Fourth Grounds For Relief

285. In his thirty-third ground for relief, applicant contends that the trial court erred in admitting victim-impact evidence, in violation of U.S. CONST. amend. VI and the constitutional prohibition against *ex post facto* laws.

286. In his thirty-fourth ground for relief, applicant argues that the trial court erred in admitting victim-impact/character evidence, creating a constitutionally impermissible risk that the death penalty would be arbitrarily imposed.

287. Specifically, applicant complains of the testimony of the complainant's daughter, Carolyn Plessner.

288. Applicant's thirty-third habeas ground alleging an *ex post facto* violation was raised and

rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 14-15, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

289. Further, on direct appeal the Court of Criminal Appeals refused to consider applicant's fourteenth point of error, repeated as applicant's thirty-fourth ground for relief in the instant habeas proceeding, because the point was not properly before the Court. *Moore v. State*, No. 74,059, slip op. at 19, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

290. During the applicant's new sentencing hearing in 2001, Carolyn Plessner testified that she was close to her father; that it was never the same after her father's death; that he was not there for her children; and that the complainant's death was hard on her mother and affected her emotionally and financially (RR26 at 70-2).

Applicant's Thirty-Fifth Ground For Relief

291. In his thirty-fifth ground for relief, applicant maintains that the trial court erred in denying his requested limiting instruction concerning the proper use of victim-impact/character evidence, in violation of U.S. CONST. amends. VIII and XIV

292. Specifically, applicant complains of the testimony of the complainant's daughter, Carolyn Plessner.

293. On direct appeal of the applicant's case, the Court of Appeals refused to address the applicant's fifteenth point of error, repeated in the instant writ proceeding as the applicant's thirty-fifth ground for relief, because the point of error was not properly before the Court. *Moore v. State*, No. 74,059, slip op. at 19, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

294. After the State and defense rested, the applicant requested the following limiting Instruction regarding victim-impact evidence: "You have heard certain testimony regarding the character of the victim in this case and the effect of his death upon the survivors. You are instructed that you are not to consider this evidence in determining the answers to Special Issue One or Special Issue Two. You have heard certain testimony regarding the character of the victim in this case and the effect of his death upon his survivors. You are instructed that you are not to use this evidence to compare the value of the life of the victim to that of other victims whose death might not result in as great a lost [sic] to their survivors or the community (RR29 at 71-72).

295. The court denied applicant's requested instruction (RR29 at 72).

296. The trial court gave an "anti-sympathy" charge stating: "You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all

the evidence before you and in answering the special issues" (2CR2 at 489).

Applicant's Thirty-Sixth Ground For Relief

297. In his thirty-sixth ground for relief applicant contends that the trial court erred in denying his motion for mistrial based on prosecutorial misconduct after the prosecution allegedly let the jury know that the applicant's co-defendant, Everett Pradia, was given a life sentence and was free and waiting in the courtroom hallway.

298. Applicant's habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 15-16, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

299. During the applicant's trial, Stella Gattie identified the applicant as one of two men who robbed her when she was working at a grocery store on April 19, 1980 (RR26 at 58-61).

300. Gattie also testified that the other robber took the money from the register (RR26 at 61).

301. The prosecutor then asked Gattie if she had seen one of the robbers in the hallway "here today," to which Gattie responded that she had seen one of them when she went to drink water (RR26 at 61).

302. Trial counsel requested that the jury he taken from the courtroom; outside the presence of the jury, counsel requested that the jury be instructed to disregard the cited testimony and he moved for mistrial (RR26 at 62).

303. Trial counsel argued that the State's question was meant to inflame the jury by showing that Pradia was out of jail "on parole or whatever, by escape or however" and to cause the witness to become upset and cry on the stand, "another example of victim impact" (RR26 at 62).

304. The State informed the trial court that it was not responsible for Pradia being there; that it had just learned of his presence from the witness; but, because Pradia was there the State wanted to bring him to the door so that Gattie could identify him as the other robber (RR26 at 62).

305. The trial court questioned both the State and trial counsel and both stated that they were not responsible for Pradia's presence although a member of the defense team had noticed Pradla earlier (RR26 at 63-5).

306. However, the State had earlier issued a subpoena for Pradia to appear on February 5, 1980, but his attorney informed them that he would assert his rights under the Fifth Amendment, so the State could not call him (RR26 at 66).

307. At the conclusion of the discussion, the trial court ordered that Pradia be removed from the floor if he was still present, because neither the State nor trial counsel wished to call him (RR26 at 67-9).

308. When the jury returned to the courtroom, the trial court instructed the jury to disregard the State's last question and the witness's last answer (RR26 at 69).

309. Neither the State nor the applicant elicited further testimony from Gattie (RR26 at 69).

310. The following day, on February 8, 1980, the bailiff of the 185th District Court informed the trial court that he spoke with Pradia the previous day and that Pradia said that he had not appeared in court in response to the subpoena for February 5th, so he thought there might have been a warrant issued based on his non-appearance, and he called a deputy told him to just come to the court (RR27 at 4).

311. Trial counsel informed the court that a member of the defense team saw Pradia and told him that he was not supposed to be in the courtroom and that he could not talk to Pradia because his attorney was not with him (RR27 at 5).

312. Applicant argues that any knowledge that Pradia, one of his co-defendants, was free constituted irrelevant and prejudicial testimony.

313. According to applicant, if the jury had thought that life "meant" life, it would have so voted, but that Pradia's free presence negated such thought.

314. However, the jury was not informed that Pradia had been charged or convicted of capital murder, much less that Pradia had received a specific sentence.

Applicant's Thirty-Seventh Ground For Relief

315. In his thirty-seventh ground for relief applicant contends that the trial court erred in overruling his objection to the State's jury argument that allegedly asked the jury to

return a death sentence for reasons outside the scope of the special issues.

316. Applicant's habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 12-13, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

317. Prior to the State's argument, trial counsel argued that applicant's actions in shooting the complainant were not deliberate; that it was questionable whether the complainant had his hands in the air; and that applicant could have discharged the gun in a panic while failing backward (RR30 at 25-34).

318. Trial counsel further argued that the applicant had changed and grown as a person and that, "[w]hen you have that connection to somebody else, once you feel part of the community, you can't go back" (RR30 at 42-3).

319. During the State's jury argument, the prosecutor argued that applicant's guilt had already been determined; that applicant had prior offenses; that applicant's defense experts did not have a full picture of applicant's record; that evidence showed that the shotgun would not discharge accidentally; that it was a reasonable inference that applicant wanted to kill the complainant so that he could not identify applicant; that applicant's conduct was deliberate; that the facts of the robbery showed that they choose to rob the "weak and defenseless"; that applicant deliberately choose a powerful weapon; that applicant's conduct

was not the fault of others; and that applicant's conduct was what the case was about (RR30 at 45-54).

320. The prosecutor then argued: "And I'll tell you what this case is all about. Well, you know, oh, he was a great guy on death row. If they're talking about executing you from 1986 and 1993, don't you think you would behave? Certainly. He's got that much sense. Anybody would. This case really, ladies and gentlemen, I submit to you, is about saving lives. By your verdict you can tell every would-be killer out there on the street right now this simple message. That if you show mercy to your victims and don't blow them away, a jury might show mercy to you. That's the message that you must send loud and clear out there. You should also tell them if you gun down innocent victims you're going to pay for it, that Harris County isn't going to stand for it, won't tolerate it one more, you are not going to murder people" (RR30 at 54-57).

321. Applicant then objected to the prosecutor "encouraging the jury not to answer the special issues and instead trying to inflame them"; the court instructed the jury to decide the case based on the evidence and the law in the jury charge and denied applicant's objection (RR30 at 54-57).

322. The prosecutor then argued: "I submit this case is about saving lives, protecting innocent victims, people with their hands up. Think about all the people in our society that have to earn their living behind a counter. They are in grocery stores. They're in convenience stores.

They're in the laundries. They're in Luby's, all the people that have to work every day behind the counter, you've got to protect those people from guys like him that don't want to leave any witnesses. Ladies and gentlemen, that was true in 1980, it is true today, and it will go true tomorrow. You must protect innocent victims from people like Bobby Moore. You cannot allow them to gun people down. It is a death warrant for people who are standing there terrified trying to remember their facts, trying to just make it through the day and get shot down scare right in the face with a shotgun. You cannot tolerate that. You cannot allow that. Just think what the criminals will think. Golly, look what Moore did" (RR30 at 54-57).

323. Applicant then objected to the prosecutor being outside the record, encouraging the jury to speculate, and trying to get the jury "not to answer the special issues according to the evidence"; the trial court overruled the objection and instructed the jury to decide the case based on the evidence and the law in the jury charge (RR30 at 54-57).

Applicant's Thirty-Eighth Through Fortieth Grounds For Relief

324. In his thirty-eighth and thirty-ninth grounds for relief, applicant contends that, in light of the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Mosley v. State*, 983 S.W.2d 249 (1998), the mitigation issue is constitutionally infirm based on the absence of a burden of proof and lack of meaningful appellate review.

325. In his fortieth ground for relief, applicant maintains that TEX. CODE CRIM. P. art. 44.251, requiring appellate review of sufficiency of all capital punishment special issues, when interpreted in conjunction with TEX. CODE CRIM. P. art. 37.071, § 2(e), placing no burden of proof in the mitigation special issue, is facially unconstitutional.

326. Applicant's habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No: 74,059, slip op. at 17-18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Forty-First and Forty-Second Grounds For Relief

327. In his forty-first ground for relief, applicant contends that the trial court erred in denying the applicant's motion for new trial on the ground that it would be cruel and unusual punishment in violation of U.S. CONST. amend. VIII to execute the applicant after spending twenty-two years on death row.

328. Applicant's forty-first habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 18-19, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

329. In his forty-second ground for relief, applicant alleges that trial counsel are ineffective for failing to present a pre-trial *Lackey* claim, 514 U.S. 1045, 115 S.Ct. 1421 (1995), protesting the

constitutionality of a death sentence after a lengthy imprisonment.

330. Counsel Morrow's affidavit states that he considered it before trial, but for some reason did not raise it, and he cannot now think of a strategic reason for not raising it before trial.

331. There is no pending execution date in applicant's case.

332. Applicant has spent his time on death row availing himself of all possible avenues of appellate and post-conviction relief in state and federal court.

333. Only after applicant obtained the relief which he sought, the setting aside of his original death sentence, and only after he again received a sentence of death in the primary case, did applicant complain that he was suffering cruel and unusual punishment based on the complexity and length of the appellate process which he initiated and continued.

334. Also, applicant is again placed at the beginning of the appellate process by the federal court's setting aside of his first death sentence and his subsequent, second death sentence in 2001.

Applicant's Forty-Third and Forty-Forth Grounds For Relief

335. In his forty-third ground for relief, applicant alleges that the State withheld exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

336. Specifically, applicant contends that the State failed to disclose information to the defense concerning Delbert Van Dusen, M.D., who

testified for the State during the 2001 punishment hearing.

337. In his forty-fourth ground for relief, applicant contends that he was denied effective assistance of appellate counsel when counsel failed to raise on direct appeal the Brady issue concerning Dr. Van Dusen.

338. Counsel Morrow's affidavit states that he did not think that this claim had any merit after the hearing on applicant's motion for new trial; thus, he made a strategic decision not to raise it.

339. Dr. Van Dusen testified as the custodian of records for the Harris County Medical Examiner's Office concerning the complainant's autopsy report (RR25 at 55).

340. Robert Bucklin, M.D., actually performed the complainant's autopsy in 1980 (RR25 at 56).

341. Dr. Bucklin's 1980 autopsy report was admitted into evidence during Van Dusen's testimony (RR25 at 56).

342. Dr. Van Dusen testified that the complainant's cause of death was a shotgun wound to the head that caused an explosive rupture to the top of the complainant's head, and that death was instantaneous (RR25 at 57-8, 63-4).

343. Further, the entrance wound was in the area between the complainant's left eye and nose, and the doctor who conducted the 1980 autopsy found shotgun pellets within the remaining cranial tissue during the autopsy (RR25 at 59).

344. When Dr. Van Dusen testified during the 2001 punishment hearing, he simply reiterated the

substance of Dr. Bucklin's 1980 autopsy report, as Dr. Van Dusen's knowledge of the complainant's autopsy was all provided by Dr. Bucklin's report (RR25 at 65).

345. According to Dr. Bucklin's 1980 autopsy report, the complainant's cause of death was a shotgun wound to the head. The report further states that the complainant's head was destroyed from above the bridge of the nose by a "massive" shotgun-type injury; that x-rays showed some shotgun pellets in the cranial cavity; and, that the entrance wound was located at the "medial border of the left eye" (State's Exhibit 46):

346. Following the punishment hearing, applicant filed a motion for new trial, and the trial court conducted a hearing on the motion on March 30, 2001 (RR25 at 535-574).

347. Applicant alleged in the motion for new trial that the State failed to disclose information that applicant could have used to impeach the qualifications and credibility of Dr. Van Dusen. In the motion, applicant conceded that the defense knew that "there had been a problem with Dr. Van Dusen's having a proper license to practice in Texas during some length of time he was performing autopsies," but applicant alleged that the defense did not know that: (1) Van Dusen was terminated from the job he held Immediately before being hired by the Harris County Medical Examiner's Office; (2) pathologists working in the Harris County Medical Examiner's Office considered Van Dusen's work unprofessional and deficient; (3) one Harris County Medical Examiner's Office

pathologist refused to approve Van Dusen's work; and (4) Van Dusen's former supervisor at the Georgia Medical Examiner's Office informed Dr. Joye Carter, Harris County Medical Examiner, of her low opinion of Van Dusen's ability and Van Dusen's being dropped from a forensics pathology. (State's Exhibit 46).

348. In support of the instant claim, applicant included in his motion for new trial the 1999 deposition of Kris Lee Speny, M.D. and the 1999 affidavit of Marilyn Murr Doyle, M.D.

349. In response to the *Brady* allegation concerning Dr. Van Dusen, the State filed controverting affidavits from Dr. Van Dusen and prosecutors Ira Jones and Lynne Parsons (RR25 at 576-591).

350. According to Van Dusen's affidavit, he was not suspended from the practice of medicine when he testified during the applicant's punishment hearing and he did not know of Doyle's affidavit or Perry's [sic] deposition (RR25 at 576-7).

351. Although prosecutors Lynne Parsons and Ira Jones were aware that Dr. Van Dusen was formerly suspended from practicing medicine, they determined that Van Dusen was not suspended when he testified in the instant cause. Further, neither prosecutor was aware of Doyle's affidavit or Sperry's deposition or their contents, other than the fact that Van Dusen was accused of practicing medicine without a license (RR25 at 578-581).

352. Ira Jones notes in his affidavit that Van Dusen was no-billed by a Harris County grand jury on

the issue of practicing medicine without a license (RR25 at 581).

353. Significantly, applicant withdrew the *Brady* allegation concerning Dr. Van Dusen during the hearing on his motion for new trial and asserted that he was waiving the allegation for purposes of the direct appeal (RR32 at 5, 38-9).

Applicant's Forty-Fifth and Forty-Sixth Grounds For Relief

354. In applicant's forty-fifth ground for relief, he maintains that he was denied the effective assistance of trial counsel based on the cumulative effect of trial counsels' alleged errors.

355. In his forty-sixth ground for relief, applicant contends that he was denied the effective assistance of appellate counsel based on the cumulative effect of appellate counsel's alleged errors.

Applicant's Forty-Seventh Ground For Relief

356. In his forty-seventh ground for relief, applicant contends that the cumulative effect of all alleged errors at trial and on direct appeal violated his rights under U.S. CONST. amends. V, VI, VIII, and XIV, and TEX. CONST. art. I, §§ 10 and 19.

Applicant's Forty-Eighth Ground For Relief

357. In his forty-eighth ground for relief, applicant contends that the Texas clemency procedure violates due process and attempts to preserve the issue for review should his instant writ fall on the merits.

358. **Applicant failed to object to the Texas clemency procedures at trial.**

CONCLUSIONS OF LAW

* * *

Applicant's Fourth Through Fourteenth Grounds for Relief

8. Applicant is procedurally barred from raising his sixth, ninth, and thirteenth grounds for habeas relief because his general objection to the lack of definitions, (2CR2 at 300), was insufficient to preserve the claim for review. TEX. CODE CRIM. P. arts. 36.14 and 36.15; *see also Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989) (upholding procedural bar to habeas relief in absence of showing of good cause for not objecting to charge or requesting special instructions concerning mitigating evidence at time of trial).

9. All of the cited terms are construed in their ordinary meanings and, therefore, do not require specific definitions. TEX. CODE CRIM. P. art. 3.01.

10. "Criminal acts of violence," "continuing threat to society," and "society" require no special definitions. *Comacho v. State*, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993) ("society" should be understood in its ordinary connotation); *Coble v. State*, 871 S.W.2d 192 (Tex. Crim. App. 1993) (court not required to define "criminal acts of violence," "continuing threat to society," and "probability" even with respect to consideration of mitigating evidence); *Goss v. State*, 826 S.W.2d 162 (Tex. Crim. App. 1992), *overruled on other grounds, Barnes v. State*, 826 S.W.2d 316 (Tex. Crim. App. 1994) (court's. refusal to define "criminal acts of violence," "continuing threat to

society," and "probability" poses no constitutional problems); *Earhart v. State*, 823 S.W.2d 607 (Tex. Crim. App. 1991) ("deliberately," "probability," "criminal acts of violence," and "continuing threat to society" require no special definitions).

11. "Culpability" is a sufficiently common word that a special definition is not required. *See and cf. Martinez v. State*, 924 S.W.2d 693, 698 (Tex. Crim. App. 1996) (*citing Garcia v. State*, 887 S.W.2d 846, 857 (Tex. Crim. App.1994)) (no error in failing to define "militate," a term that can be given its ordinary meaning).

12. Trial counsel is not ineffective for failing to make a meritless request for supplemental instructions defining such terms or for not lodging objections to the trial court's proper refusal to define them. *See Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (counsel not ineffective for failing to request unsupported charge).

13. Applicant fails to show deficient performance of trial counsel, much less harm. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) (holding standard for determining ineffective assistance of counsel is whether results of proceeding would have been different but for counsel's unstrategic errors).

14. Appellate counsel is not ineffective for failing to present such meritless claims on direct appeal of applicant's case; appellate counsel does not have a constitutional duty to raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983).

15. Courts will not second-guess an appellate attorney's professional judgment to brief only strong points of error. *Id.*

16. Applicant fails to prove by a preponderance of the evidence that, but for appellate counsel's alleged errors, the results of his proceeding would have been different. *See Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (*Strickland* applies to appellate counsel as well as trial counsel).

17. Applicant fails to prove ineffective assistance of trial counsel in his fourth, eighth, and eleventh grounds for relief.

18. Applicant fails to show that the trial court erred in not defining the cited terms in his sixth, ninth, and thirteenth grounds for relief

19. Applicant fails to show ineffective assistance of appellate counsel in his fifth, seventh, tenth, twelfth, and fourteenth grounds for relief

20. Applicant's fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth grounds for relief should be denied.

Applicant's Fifteenth and Sixteenth Grounds for Relief

21. Applicant is procedurally barred from raising his fifteenth ground for relief because the record does not reflect any objection to the manner in which the trial court responded to the notes or to the contents of the trial court's responses to the jury. *See Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

22. Moreover, because the record is silent as to whether counsel and applicant were present in court during these responses or whether

counsel objected to the proceedings or the trial court's answers, applicant fails to show that the trial court did not comply with article 36.27. *See Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995).

23. Moreover, the trial court's responses were basically "non-responses" giving the jury no additional instruction; thus, non-compliance, if any, with article 36.27 does not constitute reversible error. *See Moreno v. State*, 587 S.W.2d 405, 412 (Tex. Crim. App. 1979) (communication between court and jury which does not amount to any additional instruction cannot constitute reversible error notwithstanding noncompliance with article 36.27).

24. Applicant fails to show that the trial court violated article 36.27, and further fails to show that any alleged violation would warrant habeas relief.

25. Applicant's fifteenth ground for relief should be denied.

26. Accordingly, appellate counsel is not ineffective for failing to raise on appeal the meritless claim that trial court violated article 36.27. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983) (appellate counsel does not have a constitutional duty to raise every non-frivolous issue).

27. Applicant fails to show ineffective assistance of appellate counsel in his sixteenth ground for relief

28. Thus, applicant's sixteenth ground for relief should be denied.

Applicant's Seventeenth Through Twentieth Grounds for Relief

29. Applicant is procedurally barred from raising his seventeenth ground for relief because the record does not reflect any objection to the court sequestering his jury after reading the punishment charge or to the sequestration procedures applied. *See Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

30. In 1989 the Legislature amended TEX. CODE CRIM. P. art. 35.23 to allow separation of the jury in a felony case after the charge has been given, provided that the court shall require sequestration if either party requests it. Act of 1965, 59th Leg., ch. 722, p. 317, 1966 (amended 1989) (current version at TEX. CODE CRIM. P. art. 35.23).

31. Article 35.23 does not require the court to instruct the jury concerning its conduct during or after sequestration; it merely requires the court to instruct a jury that is permitted to separate concerning their conduct as jurors when so separated. TEX. CODE CRIM. P. art. 35.23.

32. Based on the foregoing, along with the trial court's comments to the jurors, applicant fails to show that the trial court erred in failing to properly instruct the jury concerning its conduct after sequestration.

33. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

34. Applicant has failed to show that trial counsel was ineffective for not objecting to the trial court's procedures pursuant to TEX. CODE CRIM. P. art. 35.23. *Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981), *overruled on other grounds by Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988) (fact that another attorney might have pursued different strategy will not support a finding of ineffective assistance of counsel).

35. Applicant has failed to show that appellate counsel was ineffective for failing to present on direct appeal a meritless claim concerning an alleged violation of article 35.23 and failing to allege ineffective assistance of trial counsel in that regard. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983) (courts cannot second-guess appellate attorney's professional judgment to brief only stronger points of error on direct appeal); *see also Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (applying *Strickland* to appellate counsel as well as trial counsel).

36. Applicant fails to demonstrate that his constitutional rights were violated under U.S. CONST. amends. V and XIV, and TEX. CONST. art. I, §§ 10 and 19.

37. Applicant's seventeenth through twentieth grounds for relief should be denied.

Applicant's Twenty-First Through Twenty-Third Grounds for Relief

38. Challenges to the sufficiency of the evidence are not cognizable on habeas review. *Ex parte*

Christian, 760 S.W.2d 659 (Tex. Crim. App. 1988).

39. Claims that have already been raised and rejected on direct appeal need not be considered in habeas or other subsequent proceedings and should be denied. ***Ex parte Acosta***, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

40. Applicant's twenty-first through twenty-third grounds for relief are meritless and should be denied.

Applicant's Twenty-Fourth Ground for Relief

41. Because applicant failed to adequately lodge a timely objection on this ground, and because he raised the issue on direct appeal, applicant's twenty-fourth ground need not be considered in this habeas proceeding. ***Ex parte Acosta***, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

42. Applicant is procedurally barred from challenging the constitutionality of Rule 606(b) in this proceeding because he failed to timely object on that basis. *See Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995). (complaint of a statute's constitutionality must be made at trial to preserve the issue for review).

43. Applicant's claim has been rejected by the Court of Criminal Appeals and should be denied. *See* ***M Quarrie v. State***, 380 S.W.3d 145 (Tex. Crim. App. 2012) (upholding the Rule but focusing on outside influence); ***White v. State***, 225 S.W.3d 571 (Tex. Crim. App. 2007); *see also Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739

(1987) (upholding federal equivalent to Rule 606(b)).

44. Thus, applicant's twenty-fourth ground for relief should be denied.

Applicant's Twenty-Fifth Ground for Relief

45. Applicant is procedurally barred from challenging the constitutionality of Texas's death penalty scheme as applied based on the jury's inability to assess a sentence of life without parole because he failed to timely object on that basis. *See Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (complaint of a statute's constitutionality must be made at trial to preserve the issue for review).

46. Because he raised the issue on direct appeal, applicant's twenty-fifth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

47. Moreover, Texas's previous death penalty scheme, which was in effect at the time of applicant's punishment rehearing, has been held constitutional despite its failure to give the jury an option of assessing life without parole. *Arnold v. State*, 873 S.W.2d 27, 39-40 (Tex. Crim. App. 1993).

48. Moreover, the jury was able to give effect to applicant's good conduct while in prison when answering the future dangerousness and mitigation special issues.

49. Applicant fails to show that the Texas death penalty scheme in effect at his trial was unconstitutional as applied on the basis that his

jury was unable to assess a sentence of life without parole. *Cockrell v. State*, 933 S.W.2d 73, 93 (Tex. Crim. App. 1998) (holding that a defendant has to demonstrate Texas death penalty scheme was unconstitutionally applied to him in order to obtain relief from a death sentence).

Applicant's Twenty-Sixth Ground for Relief

50. Applicant is procedurally barred from challenging the constitutionality of Texas's death penalty scheme as applied based on the "continuing threat" special issue not being susceptible to proof beyond a reasonable doubt and the jury's alleged inability to apply the reasonable doubt rule fairly in the context of such issue. *See Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (complaint of a statute's constitutionality must be made at trial to preserve the issue for review).

51. Because he raised the issue on direct appeal, applicant's twenty-sixth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

52. The trial court properly instructed the jury on the burden of proof beyond a reasonable doubt concerning the first and second special issues (CR2 at 486, 491). *See* TEX. CODE CRIM. P. art. 37.071, § 3(b)(2) and (c) (Vernon Supp. 2001); *see also Moore v. State*, No. 74,059, slip op. at 10, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Resendiz v. State*, 112 S.W.3d 541, 546

(Tex. Crim. App. 2003) (rejecting defendant's claim that future dangerousness special issue is not susceptible to proof beyond a reasonable doubt); *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

53. Applicant fails to rebut the presumption that his jury properly followed the court's instructions.

54. Applicant's twenty-sixth ground for relief should be denied.

Applicant's Twenty-Seventh Ground for Relief

55. Because he raised the issue on direct appeal, applicant's twenty-seventh ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

56. Nonetheless, in *Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1997), the Court of Criminal Appeals rejected an argument that article 37.071 is rendered unconstitutional by the definition of "mitigating evidence" found in § 2(f)(4), which allegedly "limits the concept of 'mitigation' to factors that render a capital defendant less morally 'blameworthy' for the commission of the capital murder, holding: "[a]rticle 37.071 § 2(f)(4) "defines" "mitigating evidence" to be "evidence that a juror *might* regard as reducing the defendant's moral blameworthiness." There is no evidence that must be viewed by a juror as being *per se* mitigating. Instead, jurors must individually determine what evidence, if any, mitigates against the imposition of the death penalty and what weight, if any, to give that evidence in its consideration. Article 37.071 § 2 (e) yields

further support to this interpretation in that it requires the court to instruct the jury to take into consideration "*all of* the evidence, *including* the circumstances of the offense, the defendant's character and background, *and* the personal moral culpability of the defendant" in determining whether sufficient mitigating circumstances exist to warrant a life sentence. Because the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror, we conclude that Article 37.071 § 2(f)(4) does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness as appellant alleges." Cantu, 939 S.W.2d at 648-49 (internal citations omitted; emphasis added).

57. Thus, "article 37.071, section 2(e) solves any potential narrowing problem in section 2(f)(4)." *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999) (citing Cantu, 939 S.W2d at 648).

58. Although art. 37.071, § 2(f)(4) statutorily defines mitigating evidence as that evidence that a juror might regard as reducing a defendant's moral blameworthiness, art. 37.071, § 2(e) gives the jury "a vehicle to respond to a broader range of mitigating evidence." *Prystash*, 3 S.W. 3d at 534 (*citing Cantu*, 939 S.W.2d at 648-9).

59. However, evidence relying on mere sympathy or sentiment is irrelevant in considering a defendant's deathworthiness. *Prystash*, 3 S.W.3d at 534.

60. Not instructing a jury to weigh mitigating evidence to determine if it reduces a defendant's

personal culpability is tantamount to leaving the jury directionless after it determines that certain evidence is mitigating. Thus, in the instant case, the trial court, pursuant to art. 37.071, properly and adequately instructed the jury that "[a] mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case" (2CR2 at 489).

61. Moreover, the jury could have considered evidence of applicant's good prison behavior within the scope of the future dangerousness special issue. *See Felder v. State*, 848 S.W.2d 85 (Tex. Crim. App. 1992) (holding defendant's good deeds while in prison constitutes evidence within scope of second special Issue); *Hughes v. State*, 897 S.W. 2d 285 (Tex. Crim. App. 1994) (holding defendant's evidence, Including evidence of twelve years of good behavior in prison, could be considered within scope of special issues and did not require additional *Penry*-type instruction).

62. Applicant's twenty-seventh ground for relief should be denied.

Applicant's Twenty-Eighth Ground for Relief

63. Because he raised the issue on direct appeal, applicant's twenty-eighth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

64. Pursuant to TEX. CODE CRIM. P. art. 42.07, before pronouncement of sentence a defendant

shall be asked if he has anything to say as to why the sentence should not be pronounced. The only reasons that the defendant can show for why sentence cannot be pronounced against him are (1) the defendant has received a pardon for the offense; (2) the defendant is incompetent to stand trial; and (3) the defendant is not the same person who was convicted of the offense and then escaped before pronouncement of sentence.

65. Applicant's request for "allocution" is actually a request to testify and present mitigating evidence to the jury, prior to the jury's verdict, without subjecting himself to cross-examination. *See and cf. Huffman v. State*, 746 S.W.2d 212, 219-220 (Tex. Crim. App. 1988) (holdlng that defendant who takes stand as witness is subject to cross-examination and impeachment as any other witness).

66. Further, as the Court of Criminal Appeals held on direct appeal in this case, applicant "does not possess a constitutional right to make an unsworn statement of remorse before the jury that is not subject to cross-examination." *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*quoting United States v. Hall*, 152 F.3d 381, 396 (5th Cir. 1998), *abrogated on other grounds, United States v. Martinez*, 120 S. Ct. 774 (2000).

67. By asking applicant if he had anything to say before the trial court sentenced him according to the jury verdict (RR31 at 12), the trial court complied with the statutory requirements of

art. 42.07, and the trial court properly refused the applicant to present punishment evidence not subject to cross-examination. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Twenty-Ninth Ground for Relief

68. Because he raised the issue on direct appeal, applicant's twenty-ninth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

69. Applicant's requested instruction is a misstatement of the law urging the jury to consider particular evidence as mitigating and essentially instructing the jury that any doubt concerning the applicant's guilt is mitigating. *See and cf. McFarland v. State*, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996), *abrogated on other grounds, Mosley v. State*, 983 S.W.2d 247 (Tex. Crim. App. 1998) (weighing of mitigating evidence is a subjective determination undertaken by each juror and Court will not review mitigating evidence for sufficiency).

70. Applicant's requested instruction is essentially an attempt to allow the jury to revisit the issue of the applicant's guilt, an issue previously settled by the jury's still constitutional and valid 1980 guilty verdict, during applicant's retrial on punishment only.

71. Although the Fifth Circuit recognizes residual doubt as an appropriate consideration for a mitigating factor, the applicant is not

constitutionally entitled to a jury Instruction to that effect because "The United States Supreme Court has held that there is no constitutional right to have jurors' residual doubts about the defendant's guilt be considered as a mitigating factor during deliberations in a capital murder case." *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Franklin v. Lynaugh*, 487 U.S. 164, 174-7, 108 S. Ct. 2320, 2327 (1988), *vacated and remanded on other grounds*, 503 U.S. 930 (1992) (rejecting Texas capital defendant's claim that he was entitled to residual doubt instruction under former special issues).

72. Thus, the trial court properly refused the applicant's requested instruction on residual doubt.

73. Applicant's twenty-ninth ground for relief should be denied.

Applicant's Thirtieth Ground for Relief

74. Because he raised the issue on direct appeal, applicant's thirtieth ground need not be considered in this habeas proceeding and should be denied. Ex parte Acosta, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

75. In order to show reversible harm based on evidence lost or destroyed by the State, a defendant must show either: (1) the evidence was known to be exculpatory at the time it was either lost or destroyed, and he cannot obtain comparable evidence by other reasonably available means; or (2) that, if the evidence had

only an unknown potential for exculpating him at the time it was either lost or destroyed, the State lost or destroyed the evidence in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 337 (1988); *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 2534 (1984).

76. As the Court of Criminal Appeals held on direct appeal of the applicant's case, the record does not show that the shotgun had exculpatory value before it was destroyed and there is no showing of bad faith on the part of the police concerning the shotgun's destruction. *Moore v. State*, No. 74,059, slip op. at 8, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

77. Further, trial counsel admitted at trial that counsel did not "see any bad faith on the part of the State"; that counsel did not think "there's any bad faith on the part of these prosecutors regarding the gun"; and that counsel did not think "we have evidence of bad faith." *Moore v. State*, No. 74,059, slip op. at 8-9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

78. Applicant falls to meet the tests set forth in *Trombetta* and *Youngblood*.

79. Applicant's thirtieth ground for relief should be denied.

Applicant's Thirty-First Ground for Relief

80. Because he raised the issue on direct appeal, applicant's thirty-first ground need not be

considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

81. As the Court of Criminal Appeals noted while rejecting applicant's claim on direct appeal, capital cases do not require a separate instruction on the burden of proof on extraneous offenses, as long as the jury has been properly instructed concerning the burden of proof on the special issues. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (citing Ladd v. State, 3 S.W.3d 547 (Tex. Crim. App. 1999); *see* also TEX. CODE CRIM. P. arts. 37.07 and 37.071.

82. As the trial court properly and thoroughly instructed applicant's jury as to the burden of proof on the first and second special issue; a separate instruction as to the burden of proof on extraneous offenses was not required (2CR2 at 486-7).

83. Thus, the trial court did not err in refusing applicant's requested instruction. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

84. Applicant's thirty-first ground for relief should be overruled.

Applicant's Thirty-Second Ground for Relief

85. Because he raised the issue on direct appeal, applicant's thirty-second ground need not be

considered in this habeas proceeding and should be denied. *Ex part Acosta*; 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

86. Nonetheless, applicant cannot establish entitlement to relief because he received the requested relief in light of the fact that Cross was allowed to testify to nearly everything he complains about. *See DeRusse v. State*, 579 S.W.2d 224 (Tex. Crim. App. 1979) (having received the relief requested, error, if any, is cured).

87. Moreover, the trial court properly excluded the hearsay testimony regarding the contents of Cross' mother's correspondence and her mother's motivations and feeling regarding the applicant. *See* TEX. R. EVID. 801(d) and 802.

88. As the Court of Criminal Appeals noted when rejecting applicant's claim on direct appeal, applicant did not urge that any of the proffered hearsay fell within the exception to the hearsay rule upon the trial court's ruling of inadmissible hearsay. *Moore v. State*, No. 74,059, slip op. at 13-14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Jones v. State*, 843 S.W.2d 487, 492-93 (Tex. Crim. App. 1992) (court not obligated to sort through challenged evidence to sort admissible from inadmissible); *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995) (party offering evidence must separate any admissible from inadmissible evidence to preserve for review).

89. Thus, "the trial court was within its discretion to disallow all of the evidence contained in the bill." *Moore v. State*, No. 74,059, slip op. at 14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004); *see also Montgomery v. State*, 801 S.W.2d 372, 370 (Tex. Crim. App. 1990).

90. Moreover, error, if any, in admitting any portion of Cross' testimony was cured by applicant presenting essentially the same testimony through other witnesses: that applicant grew as a person in prison, gaining compassion and kindness, and that the applicant greatly improved educationally (RR27 at 63, 92-5, 137-8, 140-1, 148). *See DeRusse v. State*, 579 S.W.2d 224 (Tex. Crim. App. 1979); *cf. Butler v. State*, 769 S.W.2d 234, 241 (Tex. Crim. App. 1989) (error in admission of evidence cured where same evidence admitted elsewhere without objection).

91. Applicant's thirty-second ground for relief should be denied.

Applicant's Thirty-Third and Thirty-Fourth Grounds for Relief

92. Because he raised the issue on direct appeal, applicant's thirty-third ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

93. A constitutionally prohibited ex post facto law is: (1) a law that makes a previously innocent action criminal and punishes such action; (2) a law that changes the punishment and inflicts a

greater punishment than the law attached to the criminal offense when committed; (3) a law that deprives an accused any defense available at the time the offense was committed; and (4) a law that alters the rules of evidence and receives less or different evidence than the law required at the time of the offense to convict the offender. *See Carmell v. Texas*, 527 U.S. 513, 522, 120 S. Ct. 1620, 1627 (2000).

94. Applicant reasons that Carolyn Plessner's testimony was admitted as a result of the change in TEX. CODE CRIM. P. art. 37.071 concerning the admission of punishment evidence in capital cases and that such change fits the fourth prohibition against *ex post facto* laws: a law that alters the rules of evidence and receives less or different testimony than the law required at the time of the offense to convict the offender.

95. However, on direct appeal of applicant's case, the Court of Criminal Appeals disagreed with applicant's contention that the fourth category concerning ex post facto laws applied to his case. *Moore v. State*, No. 74,059, slip op. at 14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

96. "Victim impact testimony is not and has never been required in a capital murder trial." *Id.*

97. The Court of Criminal Appeals also refused to address applicant's appellate claim that he would be required to waive the mitigation issue in order to prevent victim impact testimony, thereby allegedly depriving him of effective assistance of counsel. *Id.* at 14-15.

98. Applicant misconstrues the principle of ex post facto law and the judicial basis for the admissibility of Plessner's 2001 testimony.

99. Applicant ignores the fact that Plessner's testimony was admitted for punishment, not conviction; the applicant's 1980 conviction for the offense of capital murder remains valid regardless of the applicant's receiving a new punishment hearing.

100. At the time of the applicant's 1980 trial, art. 37.071 stated, in part: "Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. *In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas*. TEX. CODE CRIM. P. art. 37.071(a) (Vernon's 1979) (emphasis added).

101. However, as the United States Supreme Court later held in 1987, the admission of victim-impact evidence violated a defendant's constitutional rights. *See Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529 (1987).

102. At the time of applicant's 2001 punishment hearing, art. 37.0711, the statute for capital cases committed before September 1, 1991, tracked, in part, the same language of the 1979

statute, i.e., that the trial court can admit any matter that the court deems relevant to sentencing and that the "subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution or the United States or of this State." TEX. CODE CRIM. P. art. 37.0711, § 3(a)(1).

103. However, in 1991, the Supreme Court held that the eighth amendment is not a per se bar to the admission of evidence of the victim's personal characteristics or the impact of victim's death upon his family and loved ones. *Payne v. Tennessee*, 501 U.S. 808, 825 S. Ct. 2597 (1991), *overruling in part, Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529 (1987).

104. Thus, any constitutional bar to Plessner's testimony in 1980 was removed as a result of the Supreme Court's judicial decision in *Payne*, not because of a change in art. 37.071. *See and cf. Ex parte Bonham*, 707 S.W.2d 107, 108 (Tex. Crim. App. 1986) (holding that judicial decision having unjust retroactive application is barred by due process of United States Constitution rather than by art. I, § 10 ex post facto provision).

105. Further, art. 37.071 is procedural in nature; the statute controls the process by which a capital sentencing hearing is adjudicated as opposed to amending the substantive law by defining criminal action or providing for penalties. *See Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex. Crim. App. 1985); *Ex parte Scales*, 853 S.W.2d 586, 588 (Tex. Crim. App. 1993).

106. A procedural statute controls pending cases from the statute's effective date, absent a provision to the contrary. *Johnson*, 697 S.W.2d at 607-08.

107. In 1998, the Court of Criminal Appeals clarified its prior holdings concerning the admission of victim impact/character evidence in *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), holding that "both victim impact and victim character are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence." *Id.* at 262.

108. Because the holding in *Mosley* was in effect at the time of the applicant's 2001 sentencing hearing, it was applicable to the applicant's case as a procedural provision and the trial court properly followed it.

109. Although procedural changes may work to a defendant's disadvantage, such changes do not violate the constitutional ex post facto prohibition. *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715 (1990).

110. However, any procedural change in art. 37.071 did not work to the applicant's disadvantage, because he received the same punishment without Plessner's testimony as he did with Plessner's testimony—the death penalty.

111. In the instant case, the trial court properly admitted Plessner's testimony as relevant to the jury's decision as to punishment and the admission of her testimony did not constitute application of ex post facto law and did not

create a constitutionally impermissible risk that the death penalty would be arbitrarily imposed. *See Mosley*, 983 S.W.2d at 262.

112. Applicant's thirty-third and thirty-fourth grounds for relief should be denied.

Applicant's Thirty-Fifth Ground for Relief

113. Because the applicant did not request a limiting instruction at the introduction of the complained-of evidence, he is procedurally barred from presenting his habeas claim. *See Wesbrook v. State*, 29 S.W.3d 103, 115 n.8 (Tex. Crim. App. 2000) (noting that party opposing evidence has burden of objecting and requesting limiting instruction at introduction of evidence).

114. Regardless, a "limiting instruction is not required where evidence can be considered on any relevant issue in the case." *Prystash v. State*, 3 S.W.3d 522, 532 (Tex. Crim. App. 1999) (holding that court did not err in refusing to limit jury's consideration of defendant's other bad acts to future dangerousness special issue because defendant's other bad acts were also relevant to mitigation issue).

115. As discussed within applicant's thirty-third and thirty-fourth grounds for relief, Carolyn Plessner's testimony was relevant as to the jury's sentencing decision.

116. Moreover, applicant's requested instructed was a misstatement of the law. *See* TEX. CODE CRIM. P. art. 37.0711.

117. Because the State offered no evidence of the victim's "comparative value," the applicant was

not entitled to his requested limiting, "comparative value" instruction. *See* TEX. CODE CRIM. P. arts. 36.19 and 38.05.

118. Finally, through the submitted "anti-sympathy" charge the jury was instructed not to be swayed from any mere sentiment, if, in fact, the jury derived mere sentiment from Plessner's testimony, and the jury's attention was properly focused on the factors relating to the moral culpability of the applicant. *See Tong v. State*, 25 S.W.2d 707, 710 (Tex. Crim. App. 2000).

119. Applicant's thirty-fifth ground for relief should be denied.

Applicant's Thirty-Sixth Ground for Relief

120. Because he raised the issue on direct appeal, applicant's thirty-sixth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

121. Applicant's contention that Pradia's presence in court conveyed to the jury any specific information about a sentence is untenable given that the jury was never informed that Pradia was ever charged with or convicted of capital murder, much less that he received any specific sentence.

122. Further, error, if any, was cured by the trial court's Instruction to disregard. *Ovalle v. State*, 13 S. W.3d 774, 783 (Tex. Crim. App. 2000) (instruction to disregard generally cures any harm from improper question and answer).

123. Thus, the trial court properly denied the applicant's motion for mistrial. *See Guidry v.*

State, 9 S.W3d 133, 154 (Tex. Crim. App. 1999), *overruled on other grounds, Guidry v. Dretke*, 397 F.3d 306 (5th Cir. 2005) (instruction to disregard prosecutor's statement that codefendant received death penalty was prompt and sufficient to cure the error) (*citing Kinnamon v. State*, 791 S.W.2d 84, 89 (Tex. Crim. App. 1990)).

124. Moreover, assuming that the jury believed that Pradia had been tried for some offense relating to the primary capital murder, the fact that Pradia was no longer in prison could have created a doubt in the jury's mind concerning the severity of a death sentence for the same crime. *See Morris v. State*, 940 S.W.2d 610, 613-14 (Tex. Crim. App. 1996) (rejecting death row inmate's claim that trial court erred in excluding evidence that the State did not seek the death penalty against his two co-defendants because, inter alia, it is possible for two people committing the same crime to receive different sentences based on differing degrees of mitigation and evidence).

125. This court presumes that the jury followed the trial court's instruction to disregard Gattie's complained-of testimony, which "was not so inflammatory as to render a fair trial impossible," and where no evidence exists to indicate otherwise. *Moore v. State*, No. 74,059, slip op. at 16, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

126. Based on the foregoing, the trial court did not abuse its discretion in denying applicant's motion for mistrial.

127. Applicant's thirty-sixth ground for relief should be denied.

Applicant's Thirty-Seventh Ground for Relief

128. Because he raised the issue on direct appeal, applicant's thirty-seventh ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

129. During jury argument, counsel can properly summarize the evidence, make reasonable inferences from the evidence, answer argument of opposing counsel, and make a plea for law enforcement. *Harris v. State*, 784 S.W.2d 5, 12 (Tex. Crim. App. 1989).

130. Further, a defendant's failure to object to a jury argument or failure to pursue any objection to an adverse ruling forfeits his right to complain on appeal of the argument. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1998).

131. In this case, the prosecutor's argument was a proper response to trial counsel's prior argument that the applicant's actions were not deliberate.

132. The prosecutor made a reasonable inference that the applicant deliberately shot the complainant to avoid future identification and essentially argued that assessing the death penalty in the applicant's case would serve as deterrence for other robbers in similar circumstances. *See Jordan v. State*, 646 S. W.2d 946, 948 (Tex. Crim. App. 1983) (it is permissible to draw all reasonable, fair, and legitimate inferences from the facts in evidence); *see also Wolfe*

v. State, 917 S.W.2d 270, 281 (prosecutor may argue his opinions concerning issues in case so long as opinions are based on evidence in record and not unsworn testimony) (*quoting McKay v. State*, 707 S.W.2d 23 (Tex. Crim. App. 1985) (prosecutor's argument that "looks like it to me" concerning whether boot made certain print was based on evidence and not unsworn testimony)); *but see Rogers v. State*, 774 S.W.2d 247, 256 (Tex. Crim. App. 1989) (prohibiting arguments that death penalty does not deter crime and noting that question of general deterrence is immaterial to fact-finder), *overruled on other grounds, Peek v. State*, 106 S. W .3d 72 (Tex. Crim. App. 2003).

133. Further, the enacting of the Texas death penalty scheme which makes it a capital offense to commit a murder in the course and furtherance of an aggravated robbery predisposes the legislative intent to deter robbers from killing witnesses.

134. Also, the State made a proper plea for law enforcement by urging the jury to perform its sworn duty based on the evidence. *Moore v. State*, No. 74,059, slip op. at 12, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (citing Borjan v. State, 787 S. W.2d 53, 56 (Tex. Crim. App. 1990) (holding that prosecutor is allowed to argue that jury should deter specific crimes by its verdict).

135. Not only is the State's argument a proper plea for law enforcement in general, it is a proper

response to trial counsel's argument concerning the applicant being part of the community and, thus, a proper plea for law enforcement. *Borjan v. State*, 787 S. W .2d 53, 56 (Tex. Crim. App. 1990) (holding that argument on impact of jury's verdict on community constitutes proper plea for law enforcement).

136. The State's argument was not asking that the jury disregard the evidence in answering the special issues; it was instead urging the jury to consider the evidence and answer the special issues so that a death sentence would result (RR30 at 18-23, 45-54).

137. Finally, applicant falls to show that the State's argument was harmful, especially in light of the court's instruction that the jury decide the case based on the evidence and the law in the court's charge (RR30 at 54-57). *See Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997) (argument must be extreme or manifestly improper, or inject new facts into evidence, to constitute reversible error).

138. Based on the foregoing, the applicant's thirty-seventh ground for relief is without merit and should be denied.

Applicant's Thirty-Eighth Through Fortieth Grounds for Relief

139. Because he raised the issue on direct appeal, applicant's thirty-eighth through fortieth grounds need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

140. In *Apprendi*, the Supreme Court held that construing a state statute in relation to the due process clause of the Fourteenth Amendment also requires that any fact, other than a prior conviction, that increases the sentence beyond the statutorily-prescribed maximum must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 489, 120 S. Ct. 2348, 2362-63 (2000).

141. However, the decision in *Apprendi* is inapplicable to the Texas death penalty scheme, including the mitigation issue. To argue that the absence of a burden of proof on the mitigation issue is constitutionally infirm is to read the Court's decision in *Apprendi* too broadly; *Apprendi* is inapplicable to TEX. CODE CRIM. P. art. 37.071.

142. Under art. 37.071, the "prescribed statutory maximum" is death; there are no statutory enhancements. *See Allen v. State*, 108 S.W.3d 281, 285 (Tex. Crim. App. 2003) (holding that nothing jury or judge decided at punishment in capital trial could enhance defendant's "prescribed statutory maximum" beyond prescribed range); *see also Resendiz v. State*, 112 S.W.3d 541, 548-50 (Tex. Crim. App. 2003).

143. A jury's negative finding on the mitigation special issue does not raise the "prescribed statutory maximum" of death (whereas a jury's affirmative finding on the mitigation special issue lowers the "prescribed statutory maximum" to life). *Moore v. State*, No. 74,059, slip op. at 18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

144. Also, as noted on direct appeal of the applicant's case, the Court of Criminal Appeals has previously addressed and rejected claims that the mitigation special issue is allegedly infirm as a matter of federal constitutional law because of its lack of a burden of proof, and that the mitigation special issue violates U.S. CONST. amend. VIII, because it allegedly prevents meaningful appellate review of the jury's determination. *Moore v. State*, No. 74,059, slip op. at 17, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Jackson v. State*, 33 S.W.3d 828, 840-1 (Tex. Crim. App. 2000) *and Prystash v. State*, 3 S.W.3d 522, 535-6 (Tex. Crim. App. 1999)); *see also Resendiz*, 112 S.W.3d at 548-50.

145. Further, the Court of Criminal Appeals has previously rejected claims of an alleged statutory infirmity when art. 44.251 is considered in conjunction with art. 37.071, § 2(3). *Moore v. State*, No. 74,059, slip op. at 18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S. Ct. 312 (2004) (*citing Tong v. State*, 25 S.W.3d 707, 715 (Tex. Crim. App. 2000); *see also Jackson*, 33 S.W.3d at 840-1; *Prystash*, 3 S.W.3d at 535-6.

146. The mitigation issue, as given, does not violate U.S. CONST. amend. VIII, based of an alleged lack of meaningful appellate review. *McFarland v. State*, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W.2d

614 (Tex. Crim. App. 1996) (appellate review of mitigation issue not constitutionally required).

147. In the instant case, the applicant was not assessed punishment beyond the maximum allowable punishment, and consideration of mitigating evidence for the purpose of punishment cannot be considered an element of the offense requiring a burden of proof, thus, the holding of *Apprendi* is inapplicable to the applicant's case and to the mitigation issue of the Texas death penalty statute.

148. Based on the foregoing, the applicant's thirty-eighth, thirty-ninth, and fortieth grounds for relief are without merit and should be denied.

Applicant's Forty-First and Forty-Second Grounds for Relief

149. Applicant cannot complain or show prejudice based on any alleged inordinate delay from the time of his conviction to his, as yet, unscheduled execution due to his multiple and continued efforts to attain appellate and/or post-conviction relief in state and federal courts.

150. Regardless, valid Lackey claims are not conceptually possible: "[f]urthermore, even assuming a valid *Lackey*-claim is conceptually possible, [fn omitted] the execution of a murderer whose crime otherwise merited the death sentence would not rise to the level of a fundamental miscarriage of justice. *See McKenzie*, 57 F.3d at 1467 ("[I]t is unclear to us whether, even if it were held that delay in the imposition of the death penalty constitutes cruel and unusual punishment, commutation

of the death penalty will turn out to be the appropriate remedy.") According to Fearance's own theory, he has already suffered the cruel and unusual punishment occasioned by delay; executing him immediately would not add to this type of punishment." *Fearance v. Scott*, 56 F.3d 633, 638 (5th Cir. 1995).

151. Subsequently, the Court of Criminal Appeals addressed and rejected the notion of a Lackey claim in which a defendant complained of cruel and unusual punishment, based on his two decades of incarceration on death row. *Moore v. State*, No. 74,059, slip op. at 18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Bell v. State*, 938 S.W.2d 38, 52-3 (Tex. Crim. App. 1996)).

152. In *Bell*, the Court of Criminal Appeals held: "If this Court were to hold that executing an inmate after a threshold amount of time on death row would per se violate the Eighth Amendment, such a holding would undoubtedly encourage inmates to delay their appeals as much as possible. Even assuming the torturous effects of appellate delay, the hope of a life sentence coupled with the torturous anxiety of waiting would arguably be preferable to a certain death. We refuse to encourage inmates to prolong their appeals on hope that they could receive a life sentence if they keep their appeals alive for a certain number of years. The arbitrary results that would follow such tactics, as well as the difficulties in discerning a threshold period of

time, compound the problematic nature of appellant's claim. We decline to hold that, because of appellant's years spent waiting his execution, his execution would violate the Eighth Amendment's ban against cruel and unusual punishment." *Bell v. State*, 938 S.W.2d 38, 53 (Tex. Crim. App. 1996).

153. Applicant falls to show that a delay from the time of his 2001 death sentence to the present is per se cruel and unusual punishment, much less that the delay is cruel and unusual punishment for him in particular; thus, applicant falls to show a constitutional violation.

154. The State of Texas has not forfeited its right to carry out applicant's sentence based on his valid conviction.

155. Neither the State nor the courts should be faulted for thoroughly addressing and reviewing applicant's appellate claims.

156. Further, trial counsel are not ineffective for failing to present a meritless *Lackey* claim; in particular, counsel are not ineffective for failing to present such meritless claim prior to applicant's death sentence.

157. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

158. Applicant's forty-first and forty-second grounds for relief should be denied.

Applicant's Forty-Third and Forty-Fourth Grounds for Relief

159. In order to show a Brady violation, applicant must show that the State suppressed evidence favorable to the accused where the evidence is material either to guilt or punishment.

160. Impeachment and exculpatory evidence fall within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L.Ed.2d 104 (1972).

161. Even accepting that certain evidence is favorable to the defense, it still must be determined whether such evidence is material. *Crawford v. State*, 617 S.W.2d 925, 931 (Tex. Crim. App. 1980).

162. The standard of materiality of undisclosed evidence is whether the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985) (evidence is material where there is reasonable probability that, if disclosed, result of proceeding would have been different).

163. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (Court of Criminal Appeals adopted materiality standard set forth by Supreme Court in *Bagley*).

164. The mere possibility that undisclosed information might have helped the defense or might have affected the outcome of the trial does not

establish materiality. *Agurs*, 427 U.S. at 110, 96 S. Ct. at 2400; *Stone v. State*, 583 S.W.2d 410 (Tex. Crim. App. 1979).

165. In determining materiality, the omission must be evaluated in the context of the entire record; constitutional error is committed only if the omitted evidence creates a reasonable doubt that did not otherwise exist. *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980).

166. Generally, if a prosecutor opens his files for examination by defense counsel, he fulfills his duty to disclose exculpatory evidence even if defense counsel does not avail himself of the opportunity to read and/or further explore such information. Id.

167. Further, the suppressed evidence must also be admissible. *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex. Crim. App. 1993).

168. Even assuming that the alleged information concerning Dr. Van Dusen was favorable to applicant and was not disclosed, applicant's ground for relief is without merit because applicant fails to demonstrate that the information was material. *See Crawford*, 617 S.W.2d at 931. Van Dusen's testimony concerning the cause of the complainant's death was significant only with respect to the issue of the applicant's guilt. The applicant's guilt concerning the instant offense was resolved and not at issue during the applicant's rehearing on punishment. Further, the substance of Dr. Van Dusen's testimony was garnered solely from the 1980 autopsy report of Dr. Bucklin whose conclusions are not now challenged by

the applicant. Therefore, the allegedly omitted evidence neither creates a reasonable doubt concerning the applicant's guilt that did not otherwise exist, nor is there a reasonable probability that, if disclosed, the results of the applicant's punishment hearing would have been different. *Bagley*, 473 U.S. at 684, 105 S.Ct. at 3385.

169. Similarly, the applicant's ground for relief alleging ineffective assistance of counsel on appeal fails. As noted above, the applicant in the motion for new trial hearing waived the instant complaint for direct appeal purposes. Accordingly, the applicant is procedurally barred from advancing his ground for habeas relief. *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crlm. App. 1978).

170. Further, appellate counsel cannot be held ineffective for choosing not to advance a meritless appellate claim, as appellate counsel does not have a constitutional duty to raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983) (courts cannot second-guess an appellate attorney's professional judgment to brief only stronger points of error).

171. Moreover, applicant offers no proof that, but for appellate counsel's alleged errors, the results of the proceeding would have been different. *See Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App: 1994) (*Strickland* standard applies to appellate counsel as well as trial counsel).

172. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

173. Based on the foregoing, the applicant's forty-third and forty-fourth grounds for relief are without merit and should be denied.

Applicant's Forty-Fifth and Forty-Sixth Grounds for Relief

174. As previously noted, applicant's claims of ineffective assistance of trial counsel are without merit and should be denied. Therefore, applicant fails to show any cumulative effect of alleged error and the applicant's forty-fifth ground for relief should be denied. *Ex parte Barber*, 879 S. W.2d 889 (Tex. Crim. App. 1994) (holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas).

175. Accordingly, the applicant falls to show ineffective assistance of appellate counsel based on appellate counsel not presenting such claims on direct appeal. *See Ex parte Butler*, 884 S. W .2d 782, 783 (Tex. Crim. App. 1994) (*Strickland* standard applies to appellate counsel as well as trial counsel).

176. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

177. Based on the foregoing, the applicant's forty-fifth and forty-sixth grounds for relief are without merit and should be denied.

Applicant's Forty-Seventh Ground for Relief

178. As previously shown, applicant's alleged errors at trial and on direct appeal are meritless.

179. Thus, applicant falls to show a violation of his constitutional rights based on the cumulative effect of such alleged, meritless claims. *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994) (holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas).

180. Applicant's forty-seventh ground for relief is without merit and should be denied.

Applicant's Forty-Eighth Ground for Relief

181. Applicant is procedurally barred from raising his forty-eighth ground for relief because the record does not reflect any objection to the Texas clemency procedures at trial. *See Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

182. Further, applicant's claim is not ripe because applicant has not yet filed a petition with the Board of Pardons and Paroles and the Governor of the State of Texas requesting clemency from his 2001 death sentence.

183. Moreover, Texas's clemency procedures do not violate due process. *See Faultier v. Texas*, 178 F.3d 343 (5th Cir. 1999).

184. Applicant fails to show that the Texas clemency process violates due process in general or as applied to him.

185. Applicant's forty-eighth ground for relief is meritless and should be denied.

Conclusion

186. Applicant's grounds for relief should be ~~denied~~ *granted in part and denied in part.*

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 31433-C. *Grounds 4-48*

Date: Feb 6, 2014

/s/_____
HON. SUSAN BAETZ BROWN
Presiding Judge
185th District Court
Harris County, Texas